103D CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 103-8
Part 1

FAMILY AND MEDICAL LEAVE ACT OF 1993

FEBRUARY 2, 1993.—Ordered to be printed

Mr. FORD of Michigan, from the Committee on Education and Labor, submitted the following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 1 which on January 5, 1993, was referred jointly to the Committee on Education and Labor, the Committee on Post Office and Civil Service, and the Committee on House Administration]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 1) report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Family and Medical Leave Act of 1993".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) PURPOSES.—It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

TITLE I—GENERAL REQUIREMENTS FOR LEAVE

SEC. 101. DEFINITIONS.

As used in this title:

(1) COMMERCE.—The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (1) and (3)).

(2) ELIGIBLE EMPLOYEE.—

(A) IN GENERAL.—The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 102; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) EXCLUSIONS.—The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code (as added by title II of this Act); or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) DETERMINATION.—For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply.

(3) EMPLOY; EMPLOYEE; STATE.—The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (c), (e), and (g)).

(4) EMPLOYER.—

(A) IN GENERAL.—The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer; and

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)).

(B) PUBLIC AGENCY.—For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) EMPLOYMENT BENEFITS.—The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(6) HEALTH CARE PROVIDER.—The term "health care provider" means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) PARENT.—The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) PERSON.—The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(9) REDUCED LEAVE SCHEDULE.—The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) SECRETARY.—The term "Secretary" means the Secretary of Labor.

(11) SERIOUS HEALTH CONDITION.—The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) SON OR DAUGHTER.—The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

SEC. 102. LEAVE REQUIREMENT.

(a) IN GENERAL.—

(1) ENTITLEMENT TO LEAVE.—Subject to section 103, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) EXPIRATION OF ENTITLEMENT.—The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) LEAVE TAKEN INTERMITTENTLY OR ON A REDUCED LEAVE SCHEDULE.—

(1) IN GENERAL.—Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) ALTERNATIVE POSITION.—If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that—

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) UNPAID LEAVE PERMITTED.—Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) RELATIONSHIP TO PAID LEAVE.—

(1) UNPAID LEAVE.—If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title may be provided without compensation.

(2) SUBSTITUTION OF PAID LEAVE.—

(A) IN GENERAL.—An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) SERIOUS HEALTH CONDITION.—An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) FORESEEABLE LEAVE.—

(1) REQUIREMENT OF NOTICE.—In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the

birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) DUTIES OF EMPLOYEE.—In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) SPOUSES EMPLOYED BY THE SAME EMPLOYER.—In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

SEC. 103. CERTIFICATION.

(a) IN GENERAL.—An employer may require that a request for leave under subparagraph (C) or (D) of section 102(a)(1) be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) SUFFICIENT CERTIFICATION.—Certification provided under subsection (a) shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 102(a)(1)(C), a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 102(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee; and

(5) in the case of certification for intermittent leave or leave on a reduced leave schedule for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.

(c) SECOND OPINION.—

(1) IN GENERAL.—In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 102(a)(1), the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave.

(2) LIMITATION.—A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) RESOLUTION OF CONFLICTING OPINIONS.—

(1) IN GENERAL.—In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a), the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

(2) FINALITY.—The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

(e) SUBSEQUENT RECERTIFICATION.—The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

SEC. 104. EMPLOYMENT AND BENEFITS PROTECTION.

(a) RESTORATION TO POSITION.—

(1) IN GENERAL.—Except as provided in subsection (b), any eligible employee who takes leave under section 102 for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) LOSS OF BENEFITS.—The taking of leave under section 102 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) LIMITATIONS.—Nothing in this section shall be construed to entitle any employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) CERTIFICATION.—As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D), the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) CONSTRUCTION.—Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 to report periodically to the employer on the status and intention of the employee to return to work.

(b) EXEMPTION CONCERNING CERTAIN HIGHLY COMPENSATED EMPLOYEES.—

(1) DENIAL OF RESTORATION.—An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) AFFECTED EMPLOYEES.—An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) MAINTENANCE OF HEALTH BENEFITS.—

(1) COVERAGE.—Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) FAILURE TO RETURN FROM LEAVE.—The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 if—

(A) the employee fails to return from leave under section 102 after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1); or

(ii) other circumstances beyond the control of the employee.

(3) CERTIFICATION.—

(A) ISSUANCE.—An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case

of an employee unable to return to work because of a condition specified in section 102(a)(1)(C); or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D).

(B) COPY.—The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) SUFFICIENCY OF CERTIFICATION.—

(i) LEAVE DUE TO SERIOUS HEALTH CONDITION OF FAMILY MEMBER.—The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

(ii) LEAVE DUE TO SERIOUS HEALTH CONDITION OF EMPLOYEE.—The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

SEC. 105. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS.—

(1) EXERCISE OF RIGHTS.—It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.

(2) DISCRIMINATION.—It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.

(b) INTERFERENCE WITH PROCEEDINGS OR INQUIRIES.—It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.

SEC. 106. INVESTIGATIVE AUTHORITY.

(a) IN GENERAL.—To ensure compliance with the provisions of this title, or any regulation or order issued under this title, the Secretary shall have, subject to subsection (c), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) OBLIGATION TO KEEP AND PRESERVE RECORDS.—Any employer shall make, keep, and preserve records pertaining to compliance with this title in accordance with section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations issued by the Secretary.

(c) REQUIRED SUBMISSIONS GENERALLY LIMITED TO AN ANNUAL BASIS.—The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title or any regulation or order issued pursuant to this title, or is investigating a charge pursuant to section 107(b).

(d) SUBPOENA POWERS.—For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

SEC. 107. ENFORCEMENT.

(a) CIVIL ACTION BY EMPLOYEES.—

(1) LIABILITY.—Any employer who violates section 105 shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct

result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 proves to the satisfaction of the court that the act or omission which violated section 105 was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) RIGHT OF ACTION.—An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) FEES AND COSTS.—The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) LIMITATIONS.—The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1);

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) ACTION BY THE SECRETARY.—

(1) ADMINISTRATIVE ACTION.—The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) CIVIL ACTION.—The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A).

(3) SUMS RECOVERED.—Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) LIMITATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) WILLFUL VIOLATION.—In the case of such action brought for a willful violation of section 105, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) COMMENCEMENT.—In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) ACTION FOR INJUNCTION BY SECRETARY.—The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—

(1) to restrain violations of section 105, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) SOLICITOR OF LABOR.—The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

SEC. 108. SPECIAL RULES CONCERNING EMPLOYEES OF LOCAL EDUCATIONAL AGENCIES.

(a) APPLICATION.—

(1) IN GENERAL.—Except as otherwise provided in this section, the rights (including the rights under section 104, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this title shall apply to—

(A) any "local educational agency" (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(12))) and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) DEFINITIONS.—For purposes of the application described in paragraph (1):

(A) ELIGIBLE EMPLOYEE.—The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) EMPLOYER.—The term "employer" means an agency or school described in paragraph (1).

(b) LEAVE DOES NOT VIOLATE CERTAIN OTHER FEDERAL LAWS.—A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this title.

(c) INTERMITTENT LEAVE AND LEAVE ON A REDUCED SCHEDULE FOR INSTRUCTIONAL EMPLOYEES.—

(1) IN GENERAL.—Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 102(a)(1) that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either—

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that—

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) APPLICATION.—The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 102(e)(2).

(d) RULES APPLICABLE TO PERIODS NEAR THE CONCLUSION OF AN ACADEMIC TERM.—The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) LEAVE MORE THAN 5 WEEKS PRIOR TO END OF TERM.—If the eligible employee begins leave under section 102 more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) LEAVE LESS THAN 5 WEEKS PRIOR TO END OF TERM.—If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) LEAVE LESS THAN 3 WEEKS PRIOR TO END OF TERM.—If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) during the period that commences 3 weeks prior to the end of the academic term and the

duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) RESTORATION TO EQUIVALENT EMPLOYMENT POSITION.—For purposes of determinations under section 104(a)(1)(B) (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.

(f) REDUCTION OF THE AMOUNT OF LIABILITY.—If a local educational agency or a private elementary or secondary school that has violated this title proves to the satisfaction of the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of this title, such court may, in the discretion of the court, reduce the amount of the liability provided for under section 107(a)(1)(A) to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

SEC. 109. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

(b) PENALTY.—Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

TITLE II—LEAVE FOR CIVIL SERVICE EMPLOYEES

SEC. 201. LEAVE REQUIREMENT.

(a) CIVIL SERVICE EMPLOYEES.—

(1) IN GENERAL.—Chapter 63 of title 5, United States Code, is amended by adding at the end the following new subchapter:

"SUBCHAPTER V—FAMILY AND MEDICAL LEAVE

"§ 6381. Definitions

"For the purpose of this subchapter—

"(1) the term 'employee' means any individual who—

"(A) is an 'employee', as defined by section 6301(2), including any individual employed in a position referred to in clause (v) or (ix) of section 6301(2), but excluding any individual employed by the government of the District of Columbia and any individual employed on a temporary or intermittent basis; and

"(B) has completed at least 12 months of service as an employee (within the meaning of subparagraph (A));

"(2) the term 'health care provider' means—

"(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; and

"(B) any other person determined by the Director of the Office of Personnel Management to be capable of providing health care services;

"(3) the term 'parent' means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter;

"(4) the term 'reduced leave schedule' means leave that reduces the usual number of hours per workweek, or hours per workday, of an employee;

"(5) the term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves—

"(A) inpatient care in a hospital, hospice, or residential medical care facility; or

"(B) continuing treatment by a health care provider; and

"(6) the term 'son or daughter' means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

"(A) under 18 years of age; or

"(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

"§ 6382. Leave requirement

"(a)(1) Subject to section 6383, an employee shall be entitled to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following:

"(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

"(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

"(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

"(D) Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

"(2) The entitlement to leave under subparagraph (A) or (B) of paragraph (1) based on the birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

"(3)(A) Leave under subparagraph (A) or (B) of paragraph (1) shall not be taken by an employee intermittently unless the employee and the employing agency of the employee agree otherwise. Subject to subparagraph (B), subsection (e)(2), and section 6383(b)(5), leave under subparagraph (C) or (D) of paragraph (1) may be taken intermittently when medically necessary.

"(B) If an employee requests intermittent leave under subparagraph (C) or (D) of paragraph (1) that is foreseeable based on planned medical treatment, the employing agency may require such employee to transfer temporarily to an available alternative position offered by the employing agency for which the employee is qualified and that—

"(i) has equivalent pay and benefits; and

"(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

"(b) On agreement between the employing agency and the employee, leave under subsection (a) may be taken on a reduced leave schedule. In the case of an employee on a reduced leave schedule, any hours of leave taken by such employee under such schedule shall be subtracted from the total amount of leave remaining available to such employee under subsection (a), for purposes of the 12-month period involved, on an hour-for-hour basis.

"(c) Except as provided in subsection (d), leave granted under subsection (a) shall be leave without pay.

"(d) An employee may elect to substitute for leave under subparagraph (A), (B), (C), or (D) of subsection (a)(1) any of the employee's accrued or accumulated annual or sick leave under subchapter I for any part of the 12-week period of leave under such subsection, except that nothing in this subchapter shall require an employing agency to provide paid sick leave in any situation in which such employing agency would not normally provide any such paid leave.

"(e)(1) In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or adoption requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

"(2) In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee—

"(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee; and

"(B) shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

"§ 6383. Certification

"(a) An employing agency may require that a request for leave under subparagraph (C) or (D) of section 6382(a)(1) be supported by certification issued by the health care provider of the employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employing agency.

"(b) A certification provided under subsection (a) shall be sufficient if it states—

"(1) the date on which the serious health condition commenced;

"(2) the probable duration of the condition;

"(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

"(4)(A) for purposes of leave under section 6382(a)(1)(C), a statement that the employee is needed to care for the son, daughter, spouse, or parent, and an estimate of the amount of time that such employee is needed to care for such son, daughter, spouse, or parent; and

"(B) for purposes of leave under section 6382(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee; and

"(5) in the case of certification for intermittent leave for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.

"(c)(1) In any case in which the employing agency has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 6382(a)(1), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a second health care provider designated or approved by the employing agency concerning any information certified under subsection (b) for such leave.

"(2) Any health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employing agency.

"(d)(1) In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employing agency and the employee concerning the information certified under subsection (b).

"(2) The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employing agency and the employee.

"(e) The employing agency may require, at the expense of the agency, that the employee obtain subsequent recertifications on a reasonable basis.

"§ 6384. Employment and benefits protection

"(a) Any employee who takes leave under section 6382 for the intended purpose of the leave shall be entitled, upon return from such leave—

"(1) to be restored by the employing agency to the position held by the employee when the leave commenced; or

"(2) to be restored to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment.

"(b) The taking of leave under section 6382 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

"(c) Except as otherwise provided by or under law, nothing in this section shall be construed to entitle any restored employee to—

"(1) the accrual of any seniority or employment benefits during any period of leave; or

"(2) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

"(d) As a condition to restoration under subsection (a) for an employee who takes leave under section 6382(a)(1)(D), the employing agency may have a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work.

"(e) Nothing in this section shall be construed to prohibit an employing agency from requiring an employee on leave under section 6382 to report periodically to the employing agency on the status and intention of the employee to return to work.

"§ 6385. Prohibition of coercion

"(a) An employee shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of any rights which such other employee may have under this subchapter.

"(b) For the purpose of this section—

"(1) the term 'intimidate, threaten, or coerce' includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation); and

"(2) the term 'employee' means any 'employee', as defined by section 2105.

"§ 6386. Health insurance

"An employee enrolled in a health benefits plan under chapter 89 who is placed in a leave status under section 6382 may elect to continue the health benefits enrollment of the employee while in such leave status and arrange to pay currently into the Employees Health Benefits Fund (described in section 8909), the appropriate employee contributions.

"§ 6387. Regulations

"The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regulations prescribed under this subchapter shall, to the extent appropriate, be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1993.".

(2) TABLE OF CONTENTS.—The table of contents for chapter 63 of title 5, United States Code, is amended by adding at the end the following:

"SUBCHAPTER V—FAMILY AND MEDICAL LEAVE

"6381. Definitions.
"6382. Leave requirement.
"6383. Certification.
"6384. Employment and benefits protection.
"6385. Prohibition of coercion.
"6386. Health insurance.
"6387. Regulations.".

(b) EMPLOYEES PAID FROM NONAPPROPRIATED FUNDS.—Section 2105(c)(1) of title 5, United States Code, is amended—

(1) by striking "or" at the end of subparagraph (C); and

(2) by adding at the end the following new subparagraph:

"(E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to refer to applicable programs for employees paid from nonappropriated funds; or".

TITLE III—COMMISSION ON LEAVE

SEC. 301. ESTABLISHMENT.

There is established a commission to be known as the Commission on Leave (referred to in this title as the "Commission").

SEC. 302. DUTIES.

The Commission shall—

(1) conduct a comprehensive study of—

(A) existing and proposed policies relating to leave;

(B) the potential costs, benefits, and impact on productivity of such policies on employers; and

(C) alternative and equivalent State enforcement of title I of this Act with respect to employees described in section 108(a); and

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

SEC. 303. MEMBERSHIP.

(a) COMPOSITION.—

(1) APPOINTMENTS.—The Commission shall be composed of 12 voting members and 2 ex officio members to be appointed not later than 60 days after the date of the enactment of this Act as follows:

(A) SENATORS.—One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) MEMBERS OF HOUSE OF REPRESENTATIVES.—One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) ADDITIONAL MEMBERS.—

(i) APPOINTMENT.—Two members each shall be appointed by—

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) EXPERTISE.—Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor-management issues and shall include representatives of employers.

(2) EX OFFICIO MEMBERS.—The Secretary of Health and Human Services and the Secretary of Labor shall serve on the Commission as nonvoting ex officio members.

(b) VACANCIES.—Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) CHAIRPERSON AND VICE CHAIRPERSON.—The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) QUORUM.—Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

SEC. 304. COMPENSATION.

(a) PAY.—Members of the Commission shall serve without compensation.

(b) TRAVEL EXPENSES.—Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of title 5, United States Code, when performing duties of the Commission.

SEC. 305. POWERS.

(a) MEETINGS.—The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) HEARINGS AND SESSIONS.—The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) ACCESS TO INFORMATION.—The Commission may secure directly from any Federal agency information necessary to enable it to carry out this title, if the information may be disclosed under section 552 of title 5, United States Code. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) USE OF FACILITIES AND SERVICES.—Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(e) PERSONNEL FROM OTHER AGENCIES.—On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to serve as the Executive Director of the Commission or assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(f) VOLUNTARY SERVICE.—Notwithstanding section 1342 of title 31, United States Code, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

SEC. 306. TERMINATION.

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. EFFECT ON OTHER LAWS.

(a) FEDERAL AND STATE ANTIDISCRIMINATION LAWS.—Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) STATE AND LOCAL LAWS.—Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

SEC. 402. EFFECT ON EXISTING EMPLOYMENT BENEFITS.

(a) MORE PROTECTIVE.—Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that

provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) LESS PROTECTIVE.—The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

SEC. 403. ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES.

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

SEC. 404. REGULATIONS.

The Secretary of Labor shall prescribe such regulations as are necessary to carry out title I and this title not later than 120 days after the date of the enactment of this Act.

SEC. 405. EFFECTIVE DATES.

(a) TITLE III.—Title III shall take effect on the date of the enactment of this Act.

(b) OTHER TITLES.—

(1) IN GENERAL.—Except as provided in paragraph (2), titles I, II, and V and this title shall take effect 6 months after the date of the enactment of this Act.

(2) COLLECTIVE BARGAINING AGREEMENTS.—In the case of a collective bargaining agreement in effect on the effective date prescribed by paragraph (1), title I shall apply on the earlier of—

(A) the date of the termination of such agreement; or

(B) the date that occurs 12 months after the date of the enactment of this Act.

TITLE V—COVERAGE OF CONGRESSIONAL EMPLOYEES

SEC. 501. LEAVE FOR CERTAIN SENATE EMPLOYEES.

(a) COVERAGE.—The rights and protections established under sections 101 through 105 shall apply with respect to a Senate employee and an employing office. For purposes of such application, the term "eligible employee" means a Senate employee and the term "employer" means an employing office.

(b) CONSIDERATION OF ALLEGATIONS.—

(1) APPLICABLE PROVISIONS.—The provisions of sections 304 through 313 of the Government Employee Rights Act of 1991 (2 U.S.C. 1204–1213) shall, except as provided in subsections (d) and (e)—

(A) apply with respect to an allegation of a violation of a provision of sections 101 through 105, with respect to Senate employment of a Senate employee; and

(B) apply to such an allegation in the same manner and to the same extent as such sections of the Government Employee Rights Act of 1991 apply with respect to an allegation of a violation under such Act.

(2) ENTITY.—Such an allegation shall be addressed by the Office of Senate Fair Employment Practices or such other entity as the Senate may designate.

(c) RIGHTS OF EMPLOYEES.—The Office of Senate Fair Employment Practices shall ensure that Senate employees are informed of their rights under sections 101 through 105.

(d) LIMITATIONS.—A request for counseling under section 305 of such Act by a Senate employee alleging a violation of a provision of sections 101 through 105 shall be made not later than 2 years after the date of the last event constituting the alleged violation for which the counseling is requested, or not later than 3 years after such date in the case of a willful violation of section 105.

(e) APPLICABLE REMEDIES.—The remedies applicable to individuals who demonstrate a violation of a provision of sections 101 through 105 shall be such remedies as would be appropriate if awarded under paragraph (1) or (3) of section 107(a).

(f) EXERCISE OF RULEMAKING POWER.—The provisions of subsections (b), (c), (d), and (e), except as such subsections apply with respect to section 309 of the Government Employee Rights Act of 1991 (2 U.S.C. 1209), are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. No Senate employee may commence a judi-

cial proceeding with respect to an allegation described in subsection (b)(1), except as provided in this section.

(g) SEVERABILITY.—Notwithstanding any other provision of law, if any provision of section 309 of the Government Employee Rights Act of 1991 (2 U.S.C. 1209) or of subsection (b)(1) insofar as it applies such section 309 to an allegation described in subsection (b)(1)(A), is invalidated, both such section 309 and subsection (b)(1) insofar as it applies such section 309 to such an allegation, shall have no force and effect, and shall be considered to be invalidated for purposes of section 322 of such Act (2 U.S.C. 1221).

(h) DEFINITIONS.—As used in this section:

(1) EMPLOYING OFFICE.—The term "employing office" means the office with the final authority described in section 301(2) of such Act (2 U.S.C. 1201(2)).

(2) SENATE EMPLOYEE.—The term "Senate employee" means an employee described in subparagraph (A) or (B) of section 301(c)(1) of such Act (2 U.S.C. 1201(c)(1)) who has been employed for at least 12 months on other than a temporary or intermittent basis by any employing office.

SEC. 502. LEAVE FOR CERTAIN HOUSE EMPLOYEES.

(a) IN GENERAL.—The rights and protections under sections 102 through 105 (other than section 104(b)) shall apply to any employee in an employment position and any employing authority of the House of Representatives.

(b) ADMINISTRATION.—In the administration of this section, the remedies and procedures under the Fair Employment Practices Resolution shall be applied.

(c) DEFINITION.—As used in this section, the term "Fair Employment Practices Resolution" means rule LI of the Rules of the House of Representatives.

EXPLANATION OF THE AMENDMENT

The committee amendment strikes all after the enacting clause and inserts a substitute text. The provisions of the substitute text are explained hereafter in this report.

PURPOSE

The purpose of this legislation is to provide employees with unpaid family or medical leave at times of great need. An employee is entitled to up to 12 weeks of unpaid leave a year because of the birth of placement of a child for adoption or foster care, to provide care for an immediate family member with a serious health condition, or if the employee is unable to work because of a serious health condition. An employer is required to continue any pre-existing health benefit coverage during the leave period, and at the conclusion of leave, to reinstate the employee to the same or an equivalent position. The bill also establishes a commission to study the effects of existing and proposed policies relating to family and medical leave.

INTRODUCTION

Just as America is changing, so too is the American work force. The typical worker is no longer a man supporting a wife who stays at home, with the woman caring for the children and tending to other family needs.

According to the Women's Bureau, United States Department of Labor, by the year 2005, women will make up 47 percent of the civilian labor force, up from 38 percent in 1970, and 42 percent in 1980. By 1995, two-thirds of women with preschool-age children and three-quarters of the women with school-age children will be in the labor force. In addition, as our population ages, many working people are becoming responsible for the care of their aging parents.

The role of the family as primary nurturer and care-giver has been fundamentally affected by these changes in the work force. Often families must struggle to fulfill the traditional role of bearing and caring for children and providing emotional and physical support during times of great need. When families fail to carry out these critical functions, the societal costs are enormous.

Yet our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities. The experiences of many of our companies, as well as those of some of our global competitors, show that workplaces that accommodate workers' family responsibilities have more productive employees. Workers whose family needs are accommodated at the workplace are more likely to stay, and to be productive in their jobs.

H.R. 1 addresses these profound changes in the composition of the work force. It establishes a minimum standard that, under special circumstances, assures employees the availability of job protected, unpaid leave.

COMMITTEE ACTION

Legislative action in the 103d Congress

On January 5, 1993, Representatives Ford of Michigan, Clay, Miller of California, Murphy, Kildee, Williams, Martinez, Owens, Sawyer, Payne of New Jersey, Unsoeld, Mink, Andrews of New Jersey, Reed, Roemer, Engel, Becerra, Scott, Gene Green of Texas, Woolsey, Romero-Barcelo, Klink, English of Arizona, Strickland, Schroeder, Rouhema, Snowe, Swett, Ford of Tennessee, Matsui, Bonior, Sanders, Kennelly, Gordon, and Weldon introduced H.R. 1, the Family and Medical Leave Act of 1993, which was identical to the bill vetoed by President Bush in the 102nd Congress. The bill was referred jointly to the Committee on Education and Labor, the Committee on Post Office and Civil Service, and the Committee on House Administration. H.R. 1 has been cosponsored by more than 170 Members of Congress.

On January 21, 1993, Senator Dodd introduced S. 5, the Family and Medical Leave Act of 1993, which was referred to the Senate Committee on Labor and Human Resources.

On January 26, 1993, Chairman Pat Williams held a hearing of the Subcommittee on Labor-Management Relations on H.R. 1. Testimony in support of H.R. 1 was presented by Secretary of Labor Robert B. Reich and Judith Lichtman, President, Women's Legal Defense Fund. Appearing in opposition to the bill was Michael R. Losey, President and CEO of the Society for Human Resources Management.

On January 27, 1993, the Committee on Education and Labor, by a vote of 29 to 13, with 29 members (a quorum) voting in person, ordered the bill, as amended, favorably reported. The committee adopted, by a voice vote, two substitute amendments offered en bloc by Congressman Williams, making technical changes to H.R. 1 and conforming it to S. 5.

Prior legislative action

In 1984, the Select Committee on Children, Youth and Families conducted a comprehensive investigation of the issues involving families and child care and issued a report, entitled "Families and Child Care: Improving the Options." The Select Committee unanimously recommended that Congress review improving current leave policies, including the issue of job continuity.

On April 4, 1985, Representative Schroeder introduced H.R. 2020, the Parental and Disability Leave Act of 1985. H.R. 2020 required that employees be allowed parental leave in cases involving the birth, adoption or serious illness of a child and temporary disability leave in cases involving the inability to work due to nonoccupational medical reasons. The bill was referred jointly to the Committee on Education and Labor and the Committee on Post Office and Civil Service.

The Education and Labor subcommittees on Labor-Management Relations and Labor Standards and the Post Office and Civil Service subcommittees on Civil Service and Compensation and Employee Benefits held a joint oversight hearing on H.R. 2020 on October 17, 1985.

On March 4, 1986, Representatives Clay and Schroeder introduced H.R. 4300, the Parental and Medical Leave Act of 1986, a bill to entitle employees to parental leave in cases involving the birth, adoption or serious health condition of a son or daughter and temporary medical leave in cases involving the inability to work because of a serious health condition. H.R. 4300 was referred jointly to the Committee on Education and Labor and the Committee on Post Office and Civil Service.

On April 9, 1986, Senator Christopher Dodd introduced S. 2278, the Parental and Medical Leave Act of 1986, which was referred to the Committee on Labor and Human Resources.

The Post Office and Civil Service subcommittees on Civil Service and Compensation and Employee Benefits held a joint legislative hearing on H.R. 4300 on April 9, 1986, and on April 22, 1986, the Education and Labor subcommittees on Labor-Management Relations and Labor Standards held a joint legislative hearing on the bill.

On May 8, 1986, the Post Office and Civil Service Subcommittee on Compensation and Employee Benefits, by voice vote, ordered H.R. 4300 favorably reported. On June 11, 1986, the Committee on Post Office and Civil Service, by a roll call vote of 18 to 0, ordered H.R. 4300 favorably reported. H.R. Rep. No. 99–699, Part 1, 99th Cong., 2nd Sess. (1986).

On June 12, 1986, the Subcommittee on Labor-Management Relations ordered H.R. 4300 favorably reported by a roll call vote of 8–6. On June 24, 1986, the Committee on Education and Labor ordered H.R. 4300, as amended, favorably reported. An amendment in the nature of a substitute, offered by Congresswoman Roukema, was rejected by a vote of 13–19. An amendment in the nature of a substitute, offered by Subcommittee on Labor-Management Relations Chairman William L. Clay, was adopted by the committee by a roll call vote of 22–10. The committee, by voice vote, ordered the

bill, as amended, favorably reported. H.R. Rep. No. 99-699, Part 2, 99th Cong., 2nd Sess. (1986).

The Committee on Rules approved an open rule for the consideration of H.R. 4300 on September 17, 1986 (H. Res. 552). The 99th Congress adjourned before any further action was teken on H.R. 4300.

On February 3, 1987, Representatives Clay and Patricia Schroeder introduced H.R. 925, the Family and Medical Leave Act of 1987, a bill to provide unpaid family leave to employees upon the birth or adoption of a child or to care for a seriously ill child or parent, and temporary unpaid medical leave for an employee's own serious health condition. The bill was referred jointly to the Committee on Education and Labor and the Committee on Post Office and Civil Service.

Joint legislative hearings were conducted by the Committee on Education and Labor subcommittees on Labor-Management Relations and Labor Standards on February 25, and March 5, 1987. On May 13, 1987, the Subcommittee on Labor-Management Relations, by a voice vote, ordered the bill favorably reported.

On November 17, 1987, the Committee on Education and Labor, by a roll call vote of 21-11 with one member voting present, ordered the bill, as amended, favorably reported. H.R. Rep. No. 100-511, Part 2, 100th Cong., 2nd Sess. (1988). The committee approved an amendment in the nature of a substitute to H.R. 925, offered by ranking subcommittee minority member, Representative Roukema. All other amendments to H.R. 925 were rejected.

The Committee on Post Office and Civil Service subcommittees on Civil Service and Compensation and Employee Benefits held a legislative hearing on April 2, 1987. The Subcommittee on Civil Service approved H.R. 925, without amendment, by a vote of 3-0, on May 5, 1987. The Subcommittee on Compensation and Employee Benefits approved H.R. 925, without amendment, by voice vote, on May 19, 1987. The Committee on Post Office and Civil Service ordered the bill favorably reported, by voice vote, on February 3, 1988. H.R. Rep. No. 100-511, Part 1, 100th Cong., 2nd Sess. (1988).

On January 6, 1987, S. 249 was introduced by Senator Christopher Dodd and was referred to the Subcommittee on Children, Families, Drugs and Alcoholism and the Subcommittee on Labor of the Committee on Labor and Human Resources. The Subcommittee on Children, Families, Drugs and Alcoholism held seven legislative hearings on S. 249; three in Washington, D.C. on February 19, April 23, and October 29, 1987, and four regional hearings on June 15 in Boston, Massachusetts, July 20 in Los Angeles, California, September 14 in Chicago, Illinois and October 13 in Atlanta, Georgia.

On February 3, 1989, Representatives Clay, Roukema and Schroeder introduced H.R. 770, the Family and Medical Leave Act of 1989, which was referred jointly to the Committee on Education and Labor and the Committee on Post and Civil Service. H.R. 770 was cosponsored by 151 Members of Congress.

On February 7, 1989, the Subcommittee on Labor-Management Relations held a legislative hearing on H.R. 770. On February 28, 1989, the Subcommittee approved the bill, without amendment, by a recorded vote of 11-5.

On March 8, 1989, the Committee on Education and Labor, by a vote of 23–12, ordered the bill, as amended, favorably reported. H.R. Rep. No. 101–28, part 1, 101st Cong., 1st Sess. (1989). The committee accepted an amendment to extend coverage of the act to Congressional employees, and an amendment addressing the unique situation of public elementary and secondary school teachers. The latter amendment was the result of negotiations between the National School Board Association, teachers' unions and members of the committee.

On February 2, 1989, the Family and Medical Leave Act of 1989, S. 345, was introduced by Senator Christopher Dodd and was referred to the Committee on Labor and Human Resources. On February 2, 1989, the Subcommittee on Children, Families, Drugs and Alcoholism held a legislative hearing on S. 345.

On May 8, 1990, the House Committee on Rules granted a modified open rule for consideration of H.R. 770. On May 9 the House began consideration of the bill and on May 10, 1990, passed the bill, as amended by the Gordon-Weldon substitute, by a vote of 237 to 187. 136 Cong. Rec. H2235 (daily ed. May 10, 1990).

The Gordon-Weldon substitute reduced the period of leave from 15 weeks per year for medical leave and 10 weeks every two years for family leave to 12 weeks per year for all circumstances covered in the bill. It increased the small employer exemption from 35 (effective three years after enactment) to 50 employees, restricted the care-giving provisions to members of the immediate family (eliminating coverage for care of parents-in-law), included coverage of care for spouses, and required that doctors provide all medical certifications required under the bill. The House approved the Gordon-Weldon substitute by a vote of 259 to 157.

On June 14, 1990, the United States Senate approved H.R. 770 by voice vote, without amendment. On June 29, 1990, the bill was vetoed by President Bush. On July 25, 1990, the House of Representatives failed to override the veto by a vote of 232 to 195. 136 Cong. Rec. H5501 (daily ed. July 25, 1990).

On January 3, 1991, Representatives Clay, Roukema, Schroeder, Weldon and Gordon introduced H.R. 2, the Family and Medical Leave Act of 1991, which was identical to the bill vetoed by President Bush in the 101st Congress. The bill was referred jointly to the Committee on Education and Labor, the Committee on Post Office and Civil Service, and the Committee on House Administration. H.R. 2 was cosponsored by 180 Members of Congress.

On February 28, 1991, the Subcommittee on Labor-Management Relations, chaired by Representative Williams, held a hearing on H.R. 2.

On March 7, 1991, the Subcommittee on Labor-Management Relations approved H.R. 2 by a vote of 16–7. On March 20, 1991, the Subcommittee on Labor Standards was discharged from any further consideration of H.R. 2, and the Committee on Education and Labor, by a voice vote, ordered the bill, as amended, favorably reported. On June 27, 1991, the bill was reported to the House by the Committee on Education and Labor. H.R. Rep. No. 102–135, Part 1, 102d Cong., 1st Sess. (1991).

On January 14, 1991, Senator Dodd introduced S. 5, The Family and Medical Leave Act of 1991, with 39 cosponsors. This bill was

referred to the Senate Committee on Labor and Human Resources. The Subcommittee on Children, Family, Drugs and Alcoholism held a hearing on January 24, 1991. On May 30, 1991 the bill was favorably reported to the Senate, as amended. S. Rep. No. 102–68, 102nd Cong. 1st Sess. (1991).

On October 2, 1991, the Senate, by a voice vote, passed S. 5, as amended by the Bond substitute. The Bond substitute increased one of the eligibility thresholds from a minimum of 1,000 hours to 1,250 hours worked per year; conformed the enforcement provisions to the enforcement scheme of the Fair Labor Standards Act of 1938 (FLSA); added a requirement that 30 days' notice be given before certain leave is taken; added new employer protections from employees' abuse of leave; added new restrictions on intermittent leave; and required certification that an employee is needed to care for a sick family member before the employee could take leave for that purpose.

On November 12, 1991, the Committee on Rules reported H. Res. 275, providing for consideration of H.R. 2, which was passed by the House of Representatives on November 13, 1991 by a vote of 269 to 156. 126 Cong. Rec. H9722 (daily ed. November 13, 1991). On November 13, 1991, the House of Representatives passed H.R. 2, as amended, by the Gordon-Hyde substitute, which incorporated the provisions of the Bond substitute as passed by the Senate, by a vote of 253–177.

On August 5, 1992, following a conference between the Senate and the House of Representatives, the conferees agreed to file a conference report which was filed in the House on August 10, 1992. H.R. Rep. No. 102–816, 102nd Cong. 2nd Sess. (1992). On September 10, 1992, the House of Representatives passed the Conference Report by a vote of 241 to 161 and the Senate passed the Conference Report by unanimous consent on August 11, 1992.

On September 22, 1992, the bill was vetoed by President Bush. On September 24, 1992, the Senate overrode the veto by a vote of 68 to 31. On September 30, 1992, the House of Representatives failed to override the President's veto by a vote of 258 to 169.

STATEMENT

Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. H.R. 1 provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.

The Family and Medical Leave Act of 1993 sets a minimum labor standard.

The Family and Medical Leave Act of 1993 (FMLA) accommodates the important societal interest in assisting families by establishing minimum labor standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare bene-

fit laws, and other labor laws that establish minimum standards for employment.

Each of these standards arose in response to specific problems with broad implications. The minimum wage was enacted because of the societal interest in preventing the payment of exploitative wages. Children worked for long hours, under unsafe conditions, before the child labor laws were enacted. The Social Security Act was based on the belief that workers should be assured a minimum pension at retirement. The Occupational Safety and Health Act created standards to help assure safe and healthy workplaces.

To address concerns about the employment rights of returning veterans, Congress enacted a labor standard that is directly analogous to H.R. 1. The Veterans' Reemployment Rights Act, enacted in 1940, provides up to four years of job security to workers called to military duty (including Reservists and National Guard personnel called to active or inactive duty for training of drills). Returning workers as entitled to reinstatement to their previous job with full retention of seniority, status, pay, and any other benefits.

There is a common set of principles underlying these labor standards. In each instance, a Federal labor standard directly addressed a serious societal problem, such as the exploitation of child labor, or the exposure of workers to unsafe working conditions. Voluntary corrective actions on the part of employers had proven inadequate, with experience failing to substantiate the claim that, left alone, all employers would act responsibly. Finally, each law was enacted with the needs of employers in mind. Care was taken to establish standards that employers could meet.

It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.

The FMLA was drafted with these principles in mind and fits squarely within the tradition of the labor standards laws that have preceded it. In the past, Congress has responded to changing economic realities by enacting labor standards that are now widely accepted. In drawing on this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today's workplace.

The new demands on families and workers

The United States has experienced a demographic revolution in the composition of the work force, with profound consequences for the lives of working men and women and their families.

The General Accounting Office reports that, over the past 40 years, the female civilian labor force has increased by about one million workers each year. By 1990, nearly 57 million women were working or looking for work—more than a 200 percent increase since 1950. The Bureau of Labor Statistics predicts that by the year

2005, the female labor force participation rate will reach 66.1 percent.

In its Corporate Reference Guide to Work-Family Programs, the Families and Work Institute predicts that by 1995, two-thirds of women with preschool-age children and three-quarters of the women with school-age children will be in the labor force. Today, according to the Bureau of Labor Statistics, 96 percent of fathers and 65 percent of mothers work outside the home. The participation of women in the labor force was 19 percent in 1900; today 74 percent of women aged 25–54 are in the labor force. Fifty-six percent of mothers with children under age six and 51 percent of mothers with children under age one are in the labor force.

Women accounted for more than three-fifths (62 percent) of the increase in the civilian labor force since 1979 and it is predicted that by the year 2000, two out of three new entrants to the work force will be women. Today more than 45 percent of the U.S. labor is women.

Equally dramatic has been the substantial increase in the number of single-parent households. The Census Bureau reports that single parents accounted for 27 percent of all family groups with children under 18 years old in 1988, more than twice the 1970 population. Divorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children. These women often cannot keep their families above the poverty line. In 1987, 20 percent of all children under age six lived with single mothers. The poverty rate among these young children was 61.4 percent, more than five times the poverty rate of 11.6 percent among children living in two-parent families.

Mothers' employment is often critical in keeping their families above the poverty line. A 1990 report by Columbia University's National Center for Children in Poverty, "Five Million Children: A Statistical Profile of Our Poorest Young Citizens," found that children whose mothers work are less likely to be poor, whether they live with one or two parents. Two percent of children in married-couple families where the mothers worked full-time were poor in 1987, while the poverty rate for children in married-couple families where the mother did not work was 21 percent. For young black children whose mothers were employed full-time, the incidence of poverty declined dramatically from 26 percent to 13 percent.

H.R. 1 also responds to another dramatic demographic shift—the aging of the American population. Due to advances in medical technology and health care, Americans are living longer than ever before. The fastest growing segment of the American population is the elderly. Currently 32 million Americans are aged 65 or over, comprising 12 percent of the population. Between 1980 and 1990, the number of people aged 75 or older grew by nearly one third.

The percentage of adults in the care of their working children or parents due to physical and mental disabilities is growing. Because removing people from a home environment has been shown to be costly and often detrimental to the health and well-being of persons with mental and physical disabilities, there is a trend away from institutionalization. While preferable, independent living situations can result in increased care responsibilities for family mem-

bers, who by necessity are also wage earners. Home care, while laudable, can also add to the tension between work demands and family needs.

The National Council on Aging estimates that 20 to 25 percent of the more than 100 million American workers have some caregiving responsibility for an older relative. Two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, the most common caregiver being a child or spouse.

A 1990 study by the Southport Institute for Policy Analysis found that the conflicting demands of work and caregiving can create enormous strains. The Southport report, "Caring Too Much? American Women and the Nation's Caregiving Crisis," found that "caregiving not only causes stress for individuals, it may be a substantial drag on national productivity. In a period where shortages of skilled labor are growing, 11 percent of caregivers have left the labor force to provide care."

The need for job protected medical leave arose long before the dramatic new changes in the work force. Workers and their families have always suffered when a family member loses a job for medical reasons. But such losses are felt more today because of the dramatic rise in single heads of household who are predominantly women workers in low-paid jobs. For these women and their children, the loss of a job because of illness can have devastating consequences.

The effect of these demographic changes has been far reaching. With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults.

Testimony about the need for family leave

The testimony presented to the committee over several years of hearings has vividly demonstrated the difficulties faced by today's working families. The members of the committee have heard testimony from working men and women who have been denied leave in each of the circumstances covered by the bill.

In 1989, Mrs. Beverly Wilkinson testified that she had worked for a large Atlanta based corporation when she became pregnant with her first and only child. She requested, and was granted, five weeks pregnancy disability leave without pay and two weeks accrued vacation leave with pay. During her leave period, Mrs. Wilkinson spoke with her office weekly and there was never a hint that there would be a problem with her reinstatement. However, the day before she was to return to work she was informed that her position had been eliminated. In testimony before the Subcommittee she stated:

> I was stunned. I felt betrayed. I had invested five years of my life in this company. * * * A woman should not

> have to choose between her job and becoming a mother and a couple should not be punished for becoming a family. * * * We must bring our public policy in line with current reality of the 1980's when a two income family is the norm, not the exception.

In 1988, Ms. Lorraine Poole, an employee of a large municipality, testified to her heartbreak when she could not accept a long-awaited adoptive baby that had become available to her. He employer told her that she would lost her job if she took time off from work to receive the child and the adoption agency would not place the child unless assured that she would take some time off to be with the child. Ms. Poole was left with no choice but to decline the placement.

Another witness, Ms. Joan Curry, lost her job when she could no longer balance the responsibilities of work and caring for an elderly parent. Ms. Curry was a clerical worker for a major university in the District of Columbia when her mother, who suffered from Alzheimer's Disease, was transferred from New York City to live with her. A novice at eldercare, Ms. Curry had a difficult time finding support help, a doctor and day care. Because most of the services she needed had office hours of nine to five, Ms. Curry frequently needed to take long lunch hours and make personal calls during her own working hours. Though she had explained her situation to her supervisor, Ms. Curry was fired because her morning tardiness, long lunch breaks and personal calls (all done for the purpose of obtaining proper care for her mother) were characterized as a negative influence on her coworkers. Ms. Curry stated:

> I was experiencing the nightmare of wanting to do my best. I wanted to provide the best reasonable care for my sick mother and I wanted to provide top-quality productivity for my employer. Unfortunately I could not have both. * * * The Family and Medical Leave Act would have given me the time and reduced the stress in learning how to properly handle my mother's care. Most times, caregiving responsibilities cannot be carried out without the understanding of an employer and the time off from work.

Men are equally at risk of losing their jobs when they request family leave. In 1987, Mr. David Wilt of York, Pennsylvania, told the committee how he lost his job when he needed a few days of leave to take his recently adopted two-month old daughter with Downs syndrome to Children's Hospital in Washington, D.C., over a hundred miles away, for major heart bypass surgery. Mr. Wilt, a baker, had made specific arrangements with his employer to take three and a half days off, but on his final day he was told if he left he would be fired. Mr. Wilt, having no choice, took his daughter to the hospital and as a result lost his job. He was unable to find another job, remaining at home to care for his two disabled children while his wife is employed full time.

Stephen F. Webber, a coal miner and member of the executive board of the United Mine Workers of America, after describing his union's efforts to negotiate for family leave, stated:

> Caring for a seriously ill child presents special problems to working miners. Treatment centers for serious illnesses such as cancer are often located in urban centers, forcing families in rural communities to travel great distances. I think in particular, of one coal miner I know, whose child has cancer, and who must travel nearly 400 miles round trip each month from his rural home to take his child for treatment at a medical center in Morgantown, West Virginia.

Webber testified about the experience of several other men, including a miner whose five-year-old son became comatose after choking on a piece of food and required 24-hour a day care, care that the miner, a single parent and sole wage earner, had to provide or arrange.

At a hearing in 1986, a poignant example of the harm inflected when a seriously ill person is fired was recounted by Ms. Frances Wright. Despite 10 years of exemplary service as a retail manager of a clothing store in Virginia, she was discharged after developing cancer of the colon. She initially needed three months off for surgical procedures. Later, although she made every effort to accommodate the employer's needs by scheduling chemotherapy treatments on weekends (keeping work loss to one day), and although she had been absent from work in her 10 years with the company only two other times (for a total of three weeks), she was fired. The two-year interval before she was finally able to find new work was extremely difficult for her. As she said:

> Because of my illness, I lost my job, my self-esteem, my job satisfaction, as well as the continuity of a salary and benefits as a result of my job performance and seniority. I was angry and frustrated. I had to fight against becoming bitter. I had to fight to keep my enthusiasm, vitality and desire to lead a productive and meaningful life based on my own self-motivation and productivity.

Subsequent events in the account of Ms. Wright reveal that companies that have fired workers with serious health conditions are perfectly able to take a more generous approach. When Ms. Wright's company was taken over by a new owner, she was hired back; and this time, when she had a recurrence of the cancer, she received five weeks of paid leave, and took her leave with the emotional and financial security of knowing her job was not at risk.

There are many similar stories of workers who have been fired when their employers refused to provide an adequate leave of absence. These accounts, and many others like them presented to the committee over the past eight years, illustrate the human and economic costs of terminating employees at times of great family need.

Expert witnesses on the need for family leave

The committee has heard from numerous expert witnesses on the need for legislation establishing a minimum standard for family leave. Witnesses who testified for the bill included those with backgrounds in medicine, psychology, economics, public policy, religion, law, and public service.

Dr. T. Berry Brazelton, a nationally known pediatrician, author, chief of the Child Development Unit at Boston's Children's Hospital and associate professor of pediatrics at Harvard University, testified about the great need for job protected leave to care for infants. Dr. Brazelton explained:

> When parents are deprived too early of the opportunity to participate in the baby's developing ego structure, they lose the opportunity to understand the baby intimately and to feel their own role in development. * * * We need to prepare working parents for their roles in order to preserve the positive forces in strong attachments—to the baby and to each other. We certainly must protect the period in which the attachment process is solidified and stabilized by new parents. * * * As a nation, we can no longer afford to ignore our responsibilities toward children and their families.

Dr. Eleanor S. Szanton, executive director of the National Center for Clinical Infant Programs, testified:

> While children require careful nurturing throughout their development, the formation of loving attachments in the earliest months and years of life creates an emotional "root system" for future growth and development. How are these attachments formed? Through the daily feeding, bathing, diapering, comforting and "baby talk" that are all communications of utmost importance in beginning to give the child the sense that life is ordered, expectable and benevolent. * * * In short, these factors affect the baby's cognitive, emotional, social and physical development. * * * Once parents and babies do establish a solid attachment to each other, the transition to work and child care is likely to be easier for parents and for the child. Parents who have cared for their infant for several months are likely to understand a good deal about their child's unique personality and the kind of caregiver or setting which will be most appropriate. Babies, for their part, who have already begun the process of learning to love and trust their parents are better able to form—and to use—trusting, warm relationships with other adults.

Meryl Frank, director of the Infant Care Leave Project of the Yale Bush Center in Child Development and Social Policy, reported to the committee on the 1986 conclusions and recommendations of the Project's Advisory Committee on Infant Care Leave. The Advisory Committee, whose members include academics and professionals in child development, health and business, echoed the views of Dr. Brazelton and Dr. Szanton. They concluded that the "infant care leave problem in the United States is of a magnitude and urgency to require immediate national action."

The extent of existing family leave policies

There have been several studies examining the extent of parental leave policies, particularly leave associated with pregnancy and parenting. One of the most recent studies on parental leave was

conducted by the Bureau of Labor Statistics (BLS). Issued in June 1990, with data from 1989, the BLS survey found that 37 percent of full-time employees working in private businesses with more than 100 workers are covered by unpaid "maternity leave"; 18 percent are covered by unpaid "paternity leave." These data represent only a slight change from 1989 BLS figures that found 33 percent of workers covered by "maternity leave" and 16 percent by "paternity leave."

A recent survey commissioned by the U.S. Small Business Administration (SBA) also studied the availability of family and medical leave policies. It found that while the majority of employers currently offer some type of sickness or disability leave, often vacation leave was the only type of leave available. The SBA study found that only "1 percent of the sample offered nondiscretionary unpaid sick leaves of specified length, where the firm also provides job and seniority guarantees and health benefit continuation." Moreover, the study found 30 to 40 percent of employers do not offer job-guaranteed sick leave and that 70 to 90 percent of firms offer leave only of variable or unspecified length. The study further found that fewer than 10 percent of employers offer leave for infant care purposes.

A March 1990 survey of 253 U.S. corporations by Buck Consultants found that 27 percent of the firms currently have parental leave programs. Twenty-one percent of those firms that do not currently offer parental leave said that they intended to implement such a program within 10 years; 62 percent of employers who do not offer parental leave said they would offer such a program only if required to do so by State or Federal Governments.

Additional surveys on the extent of family leave policies were conducted by The National Council of Jewish Women, Center for the Child, conducted in 1987, and Catalyst, a national nonprofit research organization, in 1986. The findings of these surveys were consistent with later studies.

These studies, taken together, indicate that while many employers are providing family and medical leaves to their employees, a significant percentage of employers of all sizes have yet to adopt such policies. Behind these statistics are the women and men who pay a steep personal price for the lack of job-guaranteed leave. Economists Eileen Trzcinski and William Alpert, authors of the SBA study, estimate that 150,000 workers lose their jobs each year due to the lack of medical leave alone.

The FMLA will help low-wage workers

H.R. 1's guarantee of job security during family or medical crises is especially crucial to low-wage workers. Indeed, studies show that the least privileged, most vulnerable, workers are least likely to be covered by job-protected leave policies.

A study by the Institute for Women's Policy Research found that working women who do not currently benefit from employer-provided leave had average annual earnings $5000 less than women with job-guaranteed leave. The lack of job-guaranteed leave leads to further losses in earnings: working women without leave lost $9,279 or 86 percent of their pre-birth earnings after childbirth; women with leave lost 51 percent of their pre-birth earnings.

Research by the Census Bureau echoes these findings, concluding that the less education a woman has, the less likely that she will have leave when she gives birth: only 36 percent of working women with less than a high school education had leave, compared to 79 percent of women with at least four years of college. Additional analysis by Cornell University economist Eileen Trzcinski found that unmarried mothers and part-time workers are especially likely to be without job-protected leave of any kind.

Because of less access to alternative arrangements, low-income workers whose family members need care for a serious health condition have no choice—they must be absent from work for a period of time. Without job-secured family and medical leave and its promise of a steady paycheck upon return from leave, low-wage workers in the midst of family or medical emergency risk debt, welfare, and even homelessness. While the need for family leave applies to workers across the economic spectrum, that need is greatest for the low wage earner.

Equal protection and nondiscrimination

The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.

A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. H.R. 1, by addressing the needs of all workers, avoids such a risk.

Thus H.R. 1 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment.

The bill is cost effective

The best evidence that family and medical leave policies work comes from companies that have adopted those policies. The testimony of chief executive officers as well as workplace studies indicate that family and medical leave encourages loyal and skilled employees to remain with the company—improving employee morale, reducing turnover, and saving on costs for recruitment, hiring, and training.

In the 1990 study, commissioned by the U.S. Small Business Administration (SBA), a nationwide survey of business executives examined the impact on businesses of providing family and medical leave. The SBA study found that the costs of permanently replacing an employee are significantly greater than those of granting a worker's request for leave. It found that terminations because of illness, disability, pregnancy, and childbirth cost employers from $1,131 to $3,152 per termination. The cost of granting worker's requests for leave was substantially less. The study suggests that family and medical leave legislation would cost employers only $6.70 per covered employee per year.

The SBA study found that companies have routinely developed strategies to handle the work of employees while they are on leave. These strategies include re-routing work to others in the department, sending work home to the employee on leave, hiring tempo-

rary replacements, and leaving nonessential work until the employee's return from leave. The study concluded that even though many employers already have some sort of leave policy, legislation is necessary to ensure that workers receive basic guarantees of job security and continued health insurance coverage.

A 1992 study conducted by the Families and Work Institute also concluded that providing parental leave is more cost-effective for employers than permanently replacing employees who need leave. The study surveyed 331 supervisors about parental leave and its impact on productivity at a large high-technology company with a generous leave policy. It found that the cost of accommodating an employee's unpaid leave averaged 20 percent of the employee's annual salary, as compared to 75 percent to 150 percent for the cost of permanently replacing an employee; 94 percent of the leave-takers returned to the company; and 75 percent of supervisors believed that parental leave had a positive overall effect on the company's business.

The General Accounting Office (GAO) also found that the expense to employers of providing leave is minimal. In 1989, the GAO issued a cost estimate of H.R. 770, the predecessor to H.R. 1. While some inconvenience resulted, the GAO found that firms experiencing significant savings in wages not paid to the absent workers. The GAO estimated the annual cost of providing leave under the bill to be $330 million. The costs of H.R. 1 are likely to be lower than those of H.R. 770, which offered longer periods of leave than H.R. 1. The GAO also acknowledged that its estimates likely overstated the cost of leave legislation because the figures were not reduced to reflect existing family leave policies, did not take into account the key employee exemption, and did not factor in savings derived from the retention to a loyal and experienced work force.

The experience of individual employers further supports these findings. The Aetna Life and Casualty Co. reports that its family leave policy saves the company millions. Since 1988, Aetna has provided its employees with up to six months of unpaid job-guaranteed family leave each year with continued benefits and seniority. It estimates that, since the cost of permanently replacing a worker generally amounts to 93 percent of the replacement's first year salary, its generous family leave program saved approximately $2 million in 1991 by reducing employee turnover. After instituting its family leave policy in 1988, Aetna found that only 12 percent of women who needed family leave ended up leaving the company—compared with 23 percent the year before, when family leave was not an option.

As Arnold Hiatt, Chairman of the Stride Rite Corporation, has stated:

> I can tell you first-hand that family leave policies have benefited our business. When a mother—or a father—is urgently needed at home, it makes sense to allow them time off from their jobs. We have seen again and again that when the family emergency is over, the worker returns with a renewed sense of commitment. It's a good investment that is paying off for us by insuring that we have an experienced, well-trained work force with high morale.

Uniform standards like the FMLA help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness.

The Family and Medical Leave Act is cost effective on a broader level as well because when families fail it is often the public sector that picks up the tab. Weakened families have been linked to many of the major social concerns we face today. The Government has in place extensive and often costly social welfare programs to deal with these social concerns. Public policy should address the causes of these problems rather than solely their effects. The FMLA responds to problems on which we have spent heavily by proposing a labor standard that will cost relatively little.

A 1989 study, conducted by the Institute for Women's Policy Research and entitled "Unnecessary Losses", estimated the economic costs to employees and taxpayers of the failure to provide family and medical leave. It found that workers without leave suffer added unemployment and earnings losses after childbirth or illness because they cannot return to their former jobs. When they do return to work it is often at lower hourly wage rates. The study estimated that working women without family leave who give birth or adopt children suffer a cumulative earning loss of $607 million annually. Losses due to the lack of job-protected leave for workers who experience longer than average illness amount to $12.2 billion annually.

In addition, the report found that workers without leave increase the costs of public programs such as welfare, supplemental security income, and unemployment insurance. "Unnecessary Losses" estimates that these costs to taxpayers amount to $108 million annually for the lack of parental leave for women and $4.3 billion annually for the lack of medical leave.

The enactment of the FMLA is a sound investment.

Family leave laws in other countries

The United States is one of the few remaining countries in the world that has not enacted a law setting a standard for family leave. With the exception of the United States, virtually every industrialized country, as well as many Third World countries, have national policies that require employers to provide some form of maternity leave or parental leave.

The United States' major economic competitors provide some from of paid leave. Japan provides 12 weeks of partially paid pregnancy disability leave. In Canada, women can take maternity leave for up to 41 weeks and receive 60 percent of salary for the first 15 weeks. One hundred and thirty-five countries provide some maternity leave, 127 with some wage replacement. These policies are well established, with France, Great Britain and Italy having had laws requiring maternity benefits prior to World War I, which are now part of more general paid sick leave laws providing benefits for all workers unable to work for medical reasons. Among the major industrialized countries, the average minimum paid leave is 12 to 14 weeks with many also providing the right to unpaid, job-protected leaves for at least one year. In September 1992, the European Community Commission issued a directive requiring that all

member countries provide a standard minimum of 14 weeks paid maternity leave.

Sweden guarantees leave of 18 months of family leave at approximately 90 percent of gross pay. Either parent can use the leave, but not at the same time. Swedes are encouraged to use part of the leave when a child is born and to save the rest to help the child make the transition into school at age seven. A parent of a child under the age of eight is entitled to as many as 90 sick days a year to care for a child's illness. Contrary to the widely held belief that employees would abuse such a liberal leave policy, the average usage rate of this leave is seven days per year.

Several countries also provide leave for elder care. In Norway, employees can take paid leave equal to their income covered by pensions for up to one month a year to care for close relatives who are terminally ill. In Austria, paid leave of up to one week per year is available to care for a sick relative. The United Kingdom, France, and Luxembourg all have leave standards providing time off for care of an aged parent.

Many of the industrialized countries that do not have specific leave policies to cover elder care have elaborate and generous long-term health care systems. Many countries also accommodate the need for elder care by requiring that all employees have a minimum amount of paid annual leave. Workers in these countries have the flexibility to use annual leave to care for family members. Typical U.S. practice is to grant two weeks (10 days) annual leave for a new employee. In contrast, nearly all Western European countries stipulate a legal minimum annual vacation period, usually three to five weeks, starting with the first year of employment. This minimum is often extended through collective bargaining agreements, to four to six weeks vacation (plus paid public holidays). For example, in Austria, the statutory minimum for annual leave is 30 days; in Germany, 18 days; in the Netherlands, 20 days, and in Norway, 21 days.

Enactment of H.R. 1 will begin to close the gap between the leave statutes and policies in these countries and the United States.

Family leave laws in the States

Since Federal family leave legislation was first introduced, numerous States have begun to consider similar family leave initiatives. Approximately 30 States, the District of Columbia and Puerto Rico have adopted some form of family or medical leave.

California provides up to 16 weeks of leave over two years for the birth or adoption of a child, or for the serious health condition of a child, spouse, or parent. It applies to employers with 50 or more workers. California law also requires employers of five or more employees to provide women with a reasonable pregnancy disability leave of up to four months. Vermont provides 12 weeks of family and medical leave per year. Employers of 10 or more workers must provide leave to care for a newborn or newly-adopted child; employers of 15 or more must also provide leave to care for the serious health condition of a worker's child, spouse, or parent, or for the worker's own serious health condition. The District of Columbia's law provides 16 weeks every two years for family leave, and a sepa-

rate 16 weeks every two years for medical leave. Rhode Island's law provides 13 weeks of unpaid family and medical leave for birth, adoption or the serious illness of a family member and the worker's serious health condition. The Rhode Island law covers workers employed by firms of 50 or more. The Wisconsin law requires employers of 50 or more workers and the State government to grant up to six weeks of unpaid leave for the birth or adoption of a child, two weeks to care for a child, spouse or parent with a serious health condition, and two weeks of personal medical leave within a 12 month period. Oregon has enacted a law which provides for 12 weeks of unpaid parental leave per child for childbirth or adoption for all workers employed by companies with 25 or more employees. Oregon has also enacted a family leave law that provides 12 weeks of leave every two years to care for a seriously ill parent or spouse or to care for a sick child for workers employed by companies of 50 or more. The law in Maine requires private employers and local governments having 25 or more employees and the State government to grant up to eight weeks (over a two-year period) of unpaid leave for birth, adoption, care of a family member with a serious illness or the employee's own serious illness. North Dakota's law covers State employees and provides 16 weeks of family leave per year for birth, adoption, illness of a spouse, child, or parent. Pennsylvania's law covers State employees and provides six months (24 weeks) of parental leave for the birth or adoption of a child. Puerto Rico guarantees eight weeks paid pregnancy leave at half salary, which can be extended an additional 12 weeks in the event of complications. Puerto Rico's law applies to all employers, and all employees are eligible for coverage. Minnesota has a six-week parental leave law for birth or adoption covering workers at firms with 21 or more employees.

Many other States have enacted laws or regulations which protect employees' right to some form of family or medical leave including Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Tennessee, Washington, and West Virginia.

EXPLANATION OF THE BILL AND SECTION ANALYSIS

Definitions

Section 101(4)(A) defines an "employer" as any public agency as defined in section 3(x) of the FLSA, and any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." The quoted language parallels language used in title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the Equal Employment Opportunity Commission (EEOC) have interpreted this language, "[e]mploys * * * employees for each working day" is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose. For example, a bank that is open for public business five days per will be considered to

have all of its employees who are regularly maintained on its payroll as "employed for each working day," even though only a few of its employees, such as security guards or maintenance personnel, may perform work on weekend days. Similarly, part-time employees and employees on leaves of absence would be counted as "employed for each working day" so long as they are on the employer's payroll for each day of the workweek. On the other hand, an employee who begins employment, i.e., is added to the employer's payroll after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will not count as being employed on "each working day" of such week.

The terms "parent" and "son or daughter" are defined in sections 101(7) and 101(12) of the bill. These definitions reflect the reality that many children in the United States today do not live in traditional "nuclear" families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults. This legislation deals with such families by tying the availability of "parental" leave to the birth, adoption, or serious health condition of a "son or daughter" and then defining the term "son or daughter" to mean "biological, adopted, or foster child, a stepchild, legal ward, or a child of a person standing in loco parentis * * *" (Section 101(12)). In choosing this definitional language, the committee intends that the terms "parent" and "son or daughter" be broadly construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child.

The term "son or daughter" is further defined in section 101(12) to include not only children under 18 years of age, but also a son or daughter who is 18 years of age or older if he or she is "incapable of self-care because of a mental or physical disability." The bill thus recognizes that in special circumstances, where a child has a mental or physical disability, a child's need for parental care may not end when he or she reaches 18 years of age. In such circumstances, parents may continue to have an active role in caring for the son or daughter. An adult son or daughter who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling need for parental care as the child under 18 years of age with a serious health condition.

The term "employee" is defined in section 101(3) as having the same meaning given such term in section 3(e) of the FLSA. This definition is broadly inclusive, as section 3(e) of the FLSA defines "employee" as "any individual employed by an employer", and the FLSA definition of "employ", also incorporated in section 101(3), is broadly defined to include "suffer or permit to work." Included under the definition of "employee" in section 101(3) are individuals employed by public agencies such as the U.S. Postal Service or the U.S. Postal Rate Commission individuals employed by a State, including the District of Columbia, or individuals covered by the Railway Labor Act.

The term "eligible employee" is defined in section 101(2)(A) to mean an employee of a covered employer who has been employed by the employer for a total of at least 12 months. To be eligible for leave, the employee must, in addition, have worked for the employer for at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave. These 12 months of employment need not have been consecutive. Thus, the bill does not cover part time or seasonal employees working less than 1,250 hours a year.

The minimum hours of service requirement is meant to be construed broadly, consistent with the legal principles established for determining hours of work for payment of overtime compensation under section seven of the FLSA and regulations under that act, 29 CFR Part 785 (see 29 CFR 778. 103). The determining factor in meeting the minimum hours of service rule is number of hours an employee has worked for the employer within the meaning of the FLSA, and is not to be limited by methods of record keeping or compensation agreements that do not reflect all the hours an employee has worked or been in service to the employer.

the term "eligible employee" is further defined in section 101(2)(B)(ii) to exclude any employee employed at a worksite with less than 50 employees if the total number of employees employed by the employer within 75 miles of the worksite is less than 50. In aggregating the number of employees at the worksite and within the 75 miles radius, all employees of the employer, not just eligible employees, are to be counted.

The term "worksite" is intended to be construed in the same manner as the term "single site of employment" under section 2(a)(3)(B) the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. 2101(a)(3)(B), and regulations under that Act (20 CFR Part 639). Where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salepersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

The leave provisions

Section 102 H.R. 1 provides that an eligible employee may take up to 12 weeks of leave per year for the birth of a child or the placement of a child for adoption or foster care. Leave may also be taken in order to care for a child, a dependent son or daughter over the age of 18, a spouse or a parent who has a serious health condition. Finally, leave is available to an employee who, because of a serious health condition, is unable to perform the functions of his or her position.

The right to take leave applies equally to male and female employees. A father, as well as a mother, can take family leave because of the birth or serious health condition of his child; a son as well as a daughter is eligible for leave to care for a parent. When both the father and mother, or more than one sibling, are involved in the care of a child or parent, they can take leave at the same time, on an overlapping basis, or sequentially, as long as leave is taken because of one of the circumstances specified in section

102(a). Section 102 makes it possible, among other things, for a father to take leave during his wife's childbirth and recovery, an especially crucial time, even if they are employed by the same employer. Alternatively, it permits families to choose which parent or sibling will attend to extraordinary family responsibilities in light of the family's preferences, needs, career concerns, and economic considerations.

Section 102(a)(2) requires that leave provided under section 102(a)(1)(A) or (B) to care for a newborn child or a child newly placed with the employee for adoption or foster care be taken before the end of the first 12 months following the date of the birth or placement. Circumstances may, however, require that leave begin prior to the actual date of birth or placement. An expectant mother, for example, may take medical leave under section 102(a)(1)(D) prior to the birth of her child if her condition is such that she is unable to work right up to the birth. Similarly, in the case of a placement for adoption or foster care under section 102(a)(1)(B), leave may begin prior to placement if an absence from work is required for such a placement to proceed.

Section 102(a)(1)(C) allows an eligible employee to take leave to care for a parent, spouse, son or daughter who has a serious health condition. Under this provision, an employee could take leave to care for a parent or spouse of any age who, because of a serious mental or physical condition, is in a hospital or other health care facility. An employee could also take leave to care for a parent or spouse of any age who is unable to care for his or her own basic hygienic or nutritional needs or safety. Examples include a parent or spouse whose daily living activities are impaired by such conditions as Alzheimer's disease, stroke, or clinical depression, who is recovering from major surgery, or who is in the final stages of a terminal illness.

The phrase "to care for", in section 102(a)(1)(C), is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child's parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse. This language is also intended to assure eligible employees the right to a period of leave to attend to a child's, spouse's, or parent's basic needs, both during periods of inpatient care and during periods of home care, when such child, spouse, or parent has a serious health condition.

Section 102(a)(1)(D) provides that leave may be taken by an eligible employee who, because of a serious health condition, is "unable to perform the functions of the position of such employee." The requirement that the employee be unable to perform his or her job functions does not mean in each instance that the employee must literally be so physically or mentally incapacitated that he or she is generally unable to work. An employee with early-stage cancer may, for example, be physically and mentally capable of performing her job, and indeed may continue to work while receiving treatment. However, if the employee must be physically absent from work from time to time In order to receive the treatment, it follows as a matter of common sense that the employee is, during the time

of the treatments, temporarily "unable to perform the functions" of his or her position for the purposes of section 102(a)(1)(D) and therefore eligible for leave for the time necessary to receive the treatments.

Similarly, an employee who is recovering from a serious health condition may be physically and mentally capable of resuming his normal job functions, but may nevertheless require continuing medical supervision or treatment relating to that condition for which he must periodically be absent from work, rendering him temporarily "unable to perform the functions" of his position. Examples would include an employee who has returned to work following major heart surgery but is required to report periodically to a physician for examination or monitoring. It is intended that employees in such circumstances be entitled to leave under section 102(a)(1)(D).

Reduced and intermittent leave

Section 102(b)(1) of the bill provides that leave taken under sections 102(a)(1)(A) and (B) may not be taken intermittently or on a reduced leave schedule, unless the employee and the employer agree to such an arrangement. It also provides that leave taken under sections 102(a)(1)(C) and (D) may be taken intermittently or on a reduced leave schedule when medically necessary.

Such intermittent leave or reduced leave schedule does not result in a reduction in the total amount of leave to which the employee is entitled under section 102(a) beyond the amount of leave actually taken. Thus an employee who takes four hours leave for a medical treatment has utilized only 4 hours of the 12 weeks of leave to which the employee is entitled.

Under section 102(b)(2) an employer may temporarily transfer an employee taking intermittent leave or leave on a reduced leave schedule for planned medical treatment to an equivalent alternative position that better accommodates such intermittent or reduced leave. This provision gives employers greater staffing flexibility by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced leave schedule to positions that are more suitable for recurring periods of leave. At the same time, this provision ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer. We anticipate that a reduced leave schedule will often be perceived as desirable by employers who would prefer to retain a trained and experienced employee part-time for the weeks that the employee is on leave rather than hire a full-time temporary replacement.

The provision of unpaid leave in accordance with this act is not intended to affect in any way the exempt status of an employee who is otherwise exempt under regulations issued by the Secretary of Labor pursuant to section 13(a)(1) of the FLSA, the exemption applicable to bona fide executives, administrative, and professional employees. Where an employer provides family or medical leave in accordance with this act, the providing of such leave, whether paid or unpaid, as well as the maintenance of any records required by the Secretary with respect to such leave, would not be a factor in

determining whether the employee is paid on a salary basis. (Section 102(c))

Substitution of paid leave

Section 102(d) provides for the substitution of certain paid leave for the unpaid leave mandated by this legislation. When an employer has required or an employee has elected to substitute for unpaid leave appropriate paid leave of less than 12 weeks' duration, the employer need only provide an additional period of unpaid leave so that the total of paid and unpaid leave provided equals 12 weeks.

Section 102(d)(2)(A) allows an eligible employee to elect, or an employer to require the employee, to substitute any accrued paid vacation leave, personal leave, or family leave accrued by the employee for any part of the leave provided under section 102(a)(1) (A), (B) or (C). The term "family leave" is used here to refer to paid leave provided by the employer covering the particular circumstances for which the employee is seeking leave under either section 102(a)(1) (A), (B) or (C).

Section 102(d)(2)(B) allows substitution of paid vacation leave, personal leave, or medical or sick leave for any part of the leave required under section 102(a)(1)(C) or section 102(a)(1)(D). As stated in section 102(d)(2)(B), nothing in the act requires an employer to provide paid sick leave or medical leave in any situation in which the employer does not normally provide such leave.

The purpose of section 102(d) is to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under the act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. The employer may not trade shorter periods of paid leave for the longer periods of unpaid leave prescribed by the act. Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis.

Spouses employed by the same employer

Section 102(f) provides a limitation on the right to take family leave when both spouses are employed by the same employer. Under section 102(f), if both spouses are employed by the same employer, the total amount of leave that they may take is limited to 12 weeks if they are taking leave under section 102(a)(1) (A) or (B) or leave to care for a sick parent under section 102(a)(1)(C). This provision is intended to eliminate any employer incentive to refuse to hire married couples.

Notification and scheduling

The bill includes extensive notice requirements. Section 102(e) states that an employee must provide the employer with at least 30 days' notice of the need for leave for birth, adoption, or planned medical treatment when the need for such leave is foreseeable.

Such 30-day advance notice is not required in cases of medical emergency or other unforeseen events—for example, a premature birth, or sudden changes in a patient's condition that require a change in scheduled medical treatment. Similarly, parents who are

waiting to adopt a child are often given very little notice of the availability of a child. In these situations, it is often impossible for an employee to give 30 days' advance notice.

Section 102(e)(2) of the bill also accommodates employer needs in "any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment", by requiring the employee to make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations (subject to the approval of the employee's doctor or other health care provider).

Certification

Section 103 concerns certification of a serious health condition. The provision is designed as a check against employee abuse of leave under 102(a)(1) (C) and (D). If an employee requests leave because of a serious health condition or to care for a family member with a serious health condition, an employer may require that the request be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The certification must state the date on which the serious health condition began, its probable duration, and the appropriate medical facts within the knowledge of the health care provider regarding the condition.

If the certification is for leave to care for a family member, the certification must also state that the employee is needed to care for the son, daughter, spouse or parent and must include an estimate of the amount of time that such employee needs to care for the family member. Consistent with the intent of section 102(a)(1)(C) that the provision of leave "to care for" an employee's family member who has a serious health condition is to be broadly to allow leave for an employee to provide either physical or psychological care, the certification requirement in section 103(b)(4)(A) of a statement that the employee "is needed to care for" the family member is also intended to encompass a need for psychological or physical care.

If the certification is for leave because of the employee's own serious health condition, the certification must state that the employee is unable to perform the functions of the employee's position.

If the certification is for intermittent leave or leave on a reduced leave schedule for planned medical treatment—for periodic chemotherapy treatments or physical therapy sessions, for example—the certification must also state the dates on which such treatment is expected to be given and the duration of such treatment.

Section 103(c) provides that if the employer has reason to question the original certification, the employer may, at its own expense, require a second opinion from a different health care provider chosen by the employer. The health care provider may not be employed by the employer on a regular basis. Section 103(d) provides for the resolution of conflicts between first and second medical opinions. Under this section an employer may, at its own expense, require a third opinion from a provider jointly designated or approved by the employer and the employee. The third opinion will be considered final and binding. Under Section 103(e) an employer

may also require that the eligible employee obtain subsequent recertifications, but only on a reasonable basis.

The original certification shall, when possible, be provided in advance or at the commencement of the leave. If the need for leave does not allow for this, the certification should be provided reasonably soon after the commencement of the leave.

Meaning of serious health condition

The definition of "serious health condition" in section 101(11) is broad and intended to cover various types of physical and mental conditions. The policies and interpretations discussed in connection with a "serious health condition" apply to both section 102(a)(1)(C) and section 102(a)(1)(D).

With respect to an employee, the term "serious health condition" is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery. With respect to a child, spouse or parent, the term "serious health condition" is intended to cover conditions or illnesses that affect the health of the child, spouse or parent such that he or she is similarly unable to participate in school or in his or her regular daily activities.

The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into "serious health conditions" will be covered by the act. It is intended that in any case where there is doubt whether coverage is provided by this act, the general tests set forth in this paragraph shall be determinative. Of course, nothing in the act is intended or may be construed to modify or affect any law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability status, as section 401 clarifies.

Examples of serious health conditions include but are not limited to heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery. They also involve either inpatient care or continuing treatment or supervision by a health care provider, and frequently involve both. For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the

hospital; the patient must also be absent from work. Someone who has suffered a serious industrial accident may require initial lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter. A cancer patient may need to have periodic chemotherapy or radiation treatments, and a patient with severe arthritis may require periodic treatment such as physical therapy.

A pregnant patient is generally under continuing medical supervision before childbirth, may require several days off for severe morning sickness or other complications, receives inpatient care for childbirth, and is under medical supervision requiring additional time off during the recovery period from childbirth. The legislative history of the Pregnancy Discrimination Act established that the medical recovery period for a normal childbirth is four to eight weeks, with a longer period where surgery is necessary or other complications develop.

All of these health conditions require absences from work either for the condition or operation itself or for continuing medical treatment or supervision (e.g., physical therapy for accident victims or severe arthritis patients). Because continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor, section 102(b)(1) specifically permits an employee to take the leave covered by section 102(a)(1)(C) and section 102(a)(1)(D) "intermittently or on a reduced leave schedule when medically necessary." Only the time actually taken is charged against the employee's entitlement.

Employment and benefits protection

An employee taking leave under this bill is entitled, upon return from that leave, to be restored to his or her previous position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." Section 104(a)(1)(B). This provision is central to the entitlement provided in this bill.

The committee recognizes that it will not always be possible for an employer to restore an employee to the precise position held before taking leave. On the other hand, employees would be greatly deterred from taking leave without the assurance that upon return from leave, they will be reinstated to a genuinely equivalent position. Accordingly, the bill contains an appropriately stringent standard for assigning employees returning from leave to jobs other than the precise positions which they previously held. First, the standard of "equivalence"—not merely "comparability" or "similarity"—necessarily requires a correspondence to the duties and other terms, conditions, and privileges of an employee's previous position. Second, the standard encompasses all "terms and conditions" of employment, not just those specified. This standard for evaluating job equivalence under section 104(a)(1)(B) parallels title VII's standard for evaluating job discrimination in section 703(a)(1) of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e–2(a)(1)), which prohibits "discriminate[ion] with respect to [an employee's] compensation, terms, conditions, or privileges of employment." For purposes of job equivalence, the committee intends that the statutory language contained in section 104(a)(1)(B) of this act

shall be interpreted as broadly as similar language in section 703(a)(1).

Section 104(a)(2) makes explicit that an employer may not deprive an employee who takes leave of benefits accrued before the date on which the leave commenced. Section 104(a)(3)(A) states that nothing in section 104(a) should be construed to entitle a restored employee to the accrual of any seniority or employment benefits during any period of leave. Section 104(a)(3)(B) states that nothing in section 104(a) should be construed to entitle a restored employee to any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave. This means, for example, that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred.

Section 104(a)(5) allows an employer to require an employee on leave under section 102 "to report periodically to the employer on the status and intention of the employee to return to work." This is intended to allow employers only to require such reports at reasonable intervals.

Section 104(b) contains a limited exemption from the restoration requirement of section 104 for certain highly compensated employees. To be considered highly compensated, an employee must be a salaried employee and be among the highest paid 10 percent of an employer's employees within 75 miles of the facility at which the employee works. For such employees, restoration may be denied if (A) the employer shows that such denial is necessary to prevent substantial and grievous economic injury to the employer's operations, (B) the employer notifies the employee that it intends to deny restoration on such basis at the time the employer determines that such injury would occur, and (C) in any case in which the leave has commenced, the employee elects not to return to employment within a reasonable period of time after receiving such notice. In measuring grievous economic harm, a factor to be considered is the cost of losing a key employee if the employee chooses to take the leave, notwithstanding the determination that restoration will be denied. A key employee who takes leave is still eligible for continuation of health benefits even if the employee has been notified that reinstatement will be denied. Under these circumstances, no recovery of premium may be made by the employer if the employee has chosen to take or continue leave after receiving such notice.

Certification for return to work

Section 104(a)(4) provides that, as a condition of restoration for an employee who has taken leave under section 102(a)(1)(D), an employer may have a formal company policy which requires all employees to obtain medical certification from the employee's health care provider that the employee is able to resume work except that nothing in section 104(a)(4) "shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees." This language clarifies that section 104(a)(4) was not meant to supersede other valid State or local laws

or collective bargaining agreements that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave. For example, section 104(a)(4) does not supersede a State law that requires specific medical certification before the return to work of employees who have had a particular illness and who have direct contact with the public. The phrase "valid State or local law" makes it explicit that such State or local laws must not be inconsistent with any Federal law such as the Pregnancy Discrimination Act of 1978, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and other provisions of the Family and Medical Leave Act of 1993. Section 104(a)(4) should not be construed as allowing States to undermine the rights established under these or any other Federal laws. Nor does this provision affect section 401(b), which permits States to enact laws that provide "greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."

Maintenance of health benefits during leave and COBRA

Section 104(c) requires an employer to maintain health insurance benefits during periods of leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of that leave. The employer must maintain such coverage under any group health plan, as defined in section 5000(b)(1) of the Internal Revenue Code of 1986. In order to maintain health insurance coverage during the leave period, the employee is responsible for health insurance premiums at the same level as would have been required absent the leave. Nothing in section 104(c) requires an employer to provide health benefits if it does not do so at the time the employee commences leave. Section 104(c) is strictly a maintenance of benefits provision. It should be noted, however, that if an employer establishes a health benefits plan during an employee's leave, section 104(c) should be read to mean that the entitlement to health benefits would commence at the same point during the leave that the employee would have become entitled to such benefits if still on the job.

Under section 104(c)(2), an employer can recapture health insurance premiums paid during leave to an employee who fails to return to work after leave. This provision does not apply to a key employee who has been denied restoration under section 104(b). Nor does this provision apply to employees who cannot return to work because they cannot perform the functions of the job because of their own serious health condition, because of the need to care for the serious heath condition of a family member, or because of other circumstances beyond their control (section 104(c)(2)(B)).

The exceptions to the general recapture provision recognize that some employees will be unable to return to work after 12 weeks because they are themselves disabled by a serious health condition or because they are needed to care for the serious health condition of a family member—such as a child battling leukemia. In some instances, the employee's circumstances may suddenly and unexpectedly change during leave. For example, an employee taking leave for the birth of her child may discover in the tenth week of leave

that her baby has serious birth defects requiring immediate surgery, thus making it impossible for her to return to work at the end of 12 weeks. Recognizing that workers should not be penalized for their failure to return to work due to circumstances beyond their control, section 104(c)(2)(B) exempts those workers from liability for repayment of health insurance premiums paid by their employers during the leave period.

If an employee's failure to return to work is due to the continuation, recurrence, or onset of a serious health condition—either the employee's own or that of a son or daughter, spouse, or parent—under section 104(c)(3) the employer may require certification by a health care provider. For an employee who is unable to return to work because of his or her own serious health condition, such a certification is sufficient if it states that a serious health condition prevents the employee from being able to perform the functions of his or her position on the date that this or her leave expires. For an employee unable to return to work because of the serious health condition of a son or daughter, spouse, or parent, the certification is sufficient if it states that the employee is needed to care for such son, daughter, spouse, or parent on the date that the employee's leave expires. The language requiring that the certification state that the employee "is needed to care for" his or her family member is, like the same language in section 103(b)(4)(A), to be interpreted to include psychological or physical care.

Leave taken under this act does not constitute a qualifying event (as defined in section 603(2) of the Employee Retirement Income Security Act of 1974) under the continuation of health benefit provisions contained in title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272) (COBRA). However, a qualifying event triggering COBRA coverage may occur when it becomes known that an employee is not returning to employment and therefore ceases to be entitled to leave under this act. The purpose of this act is to provide leave to eligible employees for the circumstances described in section 102, and is not to be construed by employees as a means for delaying a qualifying event.

Maintenance of health benefits under multiemployer plans

Section 104(c) of the bill requires an employer to maintain coverage for the employee under any group health plan for the limited duration of the employee's leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave. In the case of an employer that contributes to a multiemployer health plan (i.e., a health plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements), this requirement means that the employer of the employee taking leave must continue contributing to the plan on behalf of the employee for the duration of the leave, as if the employee had continued in employment throughout the period of leave, unless the plan expressly provides for some other method of maintaining coverage for a period of leave required by the bill. The employee's benefit rights shall continue to be governed by the terms of the plan.

An employer may be obligated to contribute to a multiemployer health plan on behalf of its employees pursuant to a collective bargaining or other agreement, the terms of a plan, or a duty imposed by labor-management relations law. In any event, the committee's intent is that where the method of providing group health plan coverage is through contributions to a multiemployer plan, the employer, unless the plan expressly provides otherwise, shall be obligated to continue contributing as if the employee were not on leave, notwithstanding any terms of any collective bargaining or other agreement to the contrary, and the employee shall look to the plan for his or her benefit rights.

The committee recognizes that multiemployer plans need to receive contributions to finance benefit coverage. To ensure that a plan receives employer contributions, the obligation to contribute imposed by the bill, like other statutory obligations imposed by current law, shall be considered an obligation enforceable under section 515 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1145) (relating to delinquent contributions to a multiemployer plan). This is not intended to preclude any other means of enforcement that the plan may provide or be entitled to pursue, but to vest a plan with an absolute right to invoke section 515.

During the period of leave, the employer shall make contributions to the plan at the same rate and in the same amount as if the employee were continuously employed. Unless the contrary is clearly demonstrated by the employer (or by the plan, where appropriate), it shall be assumed that the employee would have continued working on the same schedule, at the same wage or salary, and otherwise under the same terms and conditions as he or she normally worked before going on leave. So, for example, if the employee normally worked 160 hours a month before taking leave and the employer is obligated to contribute to a multiemployer health plan at the rate of $1.25 an hour, the employer would be obligated to continue contributing to the plan on behalf of the employee during the leave period at the rate of $1.25 an hour for 160 hours a month, unless the employer clearly shows that the employee would have worked fewer hours, or the plan clearly shows that employee would have worked more hours, had he or she not been on leave.

A plan may adopt more specific rules governing an employer's contribution obligation during the leave period. For example, a plan may adopt a rule that an employee's normal number of work hours a month is the average number of work hours a month over the month (or a period of months) immediately prior to the employee's leave period. A plan could adopt rules which accommodate its particular reporting period (e.g., monthly, weekly). Also, the committee intends that an employer shall provide the plan with whatever information is appropriate to assist the plan in determining an employee's status and whether the employer has an obligation to contribute on behalf of the employee.

The bill does not give an employee on leave any greater rights or benefits under a multiemployer plan than an employee who is not on such leave. The same conditions of coverage shall apply to an employee on such leave as apply to an employee who is not on such leave from the employer. This includes any obligations and conditions with respect to employee contributions.

And, of course, these obligations apply only with respect to an "eligible employee" within the meaning of section 101(2) of the bill; that is, an employee who has met the length of employment test. Neither the employer nor the multiemployer plan has any obligation under the bill with respect to persons who are not "eligible employees."

Prohibited acts

Section 105(a)(1) makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the act. Section 105(a)(2) makes if unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title. This "opposition" clause is derived from of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–3(a)) and is intended to be construed in the same manner. Under title VII and under section 105(a), an employee is protected against employer retaliation for opposing any practice that he or she reasonably believes to be a violation of this title.

Title VII's opposition clause "forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 796 (1973). The Equal Employment Opportunity Commission has identified a number of examples of "opposition" protected by section 704(a) of the Civil Rights Act of 1964: complaining to anyone (including management, unions, other employees, or newspapers) about allegedly unlawful practices; participating in a group that opposes discrimination; refusing to obey an order because the worker thinks it is unlawful under the act; opposing unlawful acts by persons other than the employer—e.g., former employers, unions, and coworkers. EEOC Compliance Manual sec. 492. Section 105(a)(2) of the FMLA is intended to provide the same types of protection to workers who oppose, protest, or attempt to correct alleged violations of the FMLA.

Section 105(b) further states that it is unlawful for an employer to discharge or in any other manner discriminate against an employee because that employee has filed a charge, has instituted a proceeding under or related to title I, has given or is about to give information in connection with any inquiry or proceeding relating to a right provided under title I, or has testified or is about to testify in any inquiry or proceeding relating to a right provided under title I. This provision is modeled on section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 USC 215 (a)(3)), and is similarly intended to achieve the objectives of protecting employees who file charges or otherwise participate in inquiries or proceedings under this title and of promoting the integrity of such inquiries or proceedings.

Investigative authority

To insure compliance with the FMLA, the Secretary of Labor is given investigative authority in section 106(a) parallel to the authority provided to the Secretary with regard to enforcement of the FLSA. Under section 106(b), employers are required to make, keep, and preserve records pertaining to compliance with the FMLA, but the Secretary may not, under authority of section 106, require em-

ployers to submit their books or records to the Secretary more than once during any 12-month period unless the Secretary has reason to believe that the act has been violated or is investigating a complaint of violation.

Civil enforcement

H.R. 1's enforcement scheme is modeled on the enforcement scheme of the FLSA, which has been in effect since 1938. Thus, the FMLA creates no new agency or enforcement procedures, but instead relies on the time-tested FLSA procedures already established by the Department of Labor.

Rights established under the FMLA are enforceable through civil actions. Under section 107, a civil action for damages or equitable relief may be brought against an employer in any Federal or State court of competent jurisdiction by the Secretary of Labor or by an employee, except that an employee's right to bring such an action terminates if the Secretary of Labor files an action seeking monetary relief with respect to that employee. Actions for relief must be brought not later than two years after the date of the last event constituting the alleged violation, or within three years of the last event if the violation is willful.

Relief

The relief provided in FMLA also parallels the provisions of the FLSA. Section 107 provides for injunctive and monetary relief for violations of the act.

Section 107(a)(1)(A)(i) provides that an employer who violates section 105 of the act shall be liable to the eligible employee either for an amount equal to the wages, salary, employment benefits, or other compensation denied or lost to such employee because of the violation, or in cases in which no wages or other compensation were denied to the employee, for an amount equal to the actual monetary losses sustained by the employee as the result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee. Section 107 (a)(1)(A)(ii) provides that an employer also shall be liable for the interest on that amount described in section 107(a)(1)(A)(ii), calculated at the prevailing rate.

Section 107(a)(1)(A)(iii) provides that an employer shall be liable for an additional amount as liquidated damages, equal to the sum of the amount described in section 107(a)(1)(A) (i) and (ii). The section provides, however, that the court has the discretion to award no liquidated damages, if the employer proves to the satisfaction of the court that the act or omission was made in good faith and the employer had reasonable grounds for believing that it was not a violation.

Relief available under section 107(a)(1)(B) in the event of a violation also includes equitable relief such as employment, reinstatement, or promotion of the affected employee, and any other equitable relief that may be appropriate. This section is intended to provide employees with the right to pursue all varieties of equitable relief, including preliminary relief.

Section 107(a)(3) provides that in addition to any judgment awarded to the plaintiff, the court shall allow reasonable attorney's

fees, reasonable expert witness fees, and other costs of the action to be paid by the defendant. With the exception of the allowance of expert witness fees, this provision is modeled after section 216(b) of the Fair Labor Standards Act, and therefore should be interpreted in the same way as the FLSA. According to the Federal courts, the award of attorney's fees under the FLSA is mandatory and unconditional. A court has no discretion to deny fees to a prevailing plaintiff; its discretion extends only to the amount allowed. *Shelton* v. *Ervin,* 830 F.2d 182, 184 (11th Cir. 1987); *United Slate, Tile and Composition Roofers* v. *G & M Roofing,* 732 F.2d 495, 501 (6th Cir. 1984); *Graham* v. *Henegar,* 640 F.2d 732, 736 (5th Cir. 1981) (en banc). See also *Hagelthorn* v. *Kennecott Corp.,* 710 F.2d 76, 86 (2d Cir. 1983).

The provision requiring defendants to pay reasonable expert fees has been included in the bill in direct response to the Supreme Court's holding in *West Virginia University Hospitals, Inc.* v. *Casey,* 111 S.Ct. 1138 (1991). In that case, the Court made clear that expert witness fees will be awarded only if explicitly authorized by statute.

Special rules concerning employees of local educational agencies

Section 108 addresses the unique educational mission of our public elementary and secondary schools. It is premised on the belief that schools are a special institution that require special attention. It recognizes the need to balance the educational needs of children with the family leave needs of teachers.

Section 108(d)(1) provides that in certain circumstances teachers returning from leave under the act within the last three weeks of a school term could be required to extend their leave until the end of the semester. This affords teachers the needed leave without interrupting the educational process at a key point in the year. When a teacher needs to be repeatedly away from work because of recurrent medical treatments for a serious medical condition, the school may require that the teacher choose between taking off a block of time or being temporarily transferred to a position that better accommodates the repeated leave.

Section 108(b) states that a local education agency does not violate the Education of the Individuals With Disabilities Education Act, section 504 of the Rehabilitation Act of 1973, or title VI of the Civil Rights Act of 1964 solely as a result of granting leave under the FMLA. This section is intended to clarify the relationship of the FMLA to certain other Federal statutes. It makes clear that simply granting leave under the act does not in and of itself violate the statutes listed in this section. However, the granting of leave does not relieve a local educational agency from its obligations under such acts.

The phrase "an eligible employee principally in an instructional capacity" under section 108 (c) and (d) is intended to include teachers or other instructional employees whose principal function is directly providing educational services. This would include special education assistants, such as signers, whose presence in the classroom is necessary to the educational process. It would not include teacher assistants, cafeteria workers, building service workers, bus drivers, and other primarily noninstructional employees.

Whenever a teacher is required to extend his or her leave under section 108(c) or (d), that leave would be treated as other leave under the act, with the same rights to employment and benefits protection set forth in section 104. Reasonable grounds under section 108(f) could include such factors as advice of counsel, collective bargaining agreements, and compliance with valid State and local laws, the laws referenced in 108(b) and regulations or policies promulgated by the Department of Labor.

Commission on family and medical leave

Title III of the act establishes a bipartisan commission to be known as the Commission of Leave, to conduct a comprehensive study of existing and proposed leave policies, the potential costs, benefits, and impact on productivity of such policies on employers. The study should also include examination of possibilities for State rather than Federal enforcement of family and medical leave rights of employees of local educational agencies. The Commission is to report its findings to Congress within two years of its first meeting.

The Commission is to be composed of 12 voting members and two ex-officio members. The Speaker and Minority Leader of the House of Representatives and the Majority and Minority leaders of the Senate each are to appoint to the Commission one Member of Congress and two additional Commission members selected by virtue of their expertise in family, medical and labor-management issues, including representatives of employers. The Secretary of Health and Human Services and Secretary of Labor shall serve as nonvoting ex-officio members.

Miscellaneous

Title IV of the act contains miscellaneous provisions concerning the effect of this legislation on other legislation and on existing employment benefits, encouraging more generous leave policies, regulations, and effective dates. Section 401(a) provides that nothing in the act shall be construed to modify or affect in any way any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. Thus, for example, nothing in this legislation may be read to affect or amend title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.)

The FMLA is also not intended to modify or to affect the Rehabilitation Act of 1973, as amended, or the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans With Disabilities Act of 1990 (2 U.S.C. 1210, et seq.) or the regulations issued under that act. Thus, the leave provisions of FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the Americans With Disabilities Act of 1990, employers who receive Federal financial assistance, employers who contract with the Federal Government, or the Federal Government itself. The purpose of the act is to apply the leave provisions of the Family and Medical Leave Act of 1993, to make leave available so eligible employees, and not to limit already existing rights and protections.

The intention of section 401(b) is to make clear that States or localities are permitted to enact family and medical leave laws that provide more generous leave rights than those provided by H.R. 1. This applies to any provision of any State or local law in effect at the time of enactment or any provision of any State or local enacted in the future. Thus, for example, State or local governments are free to enact laws that provide greater employee coverage, longer leave periods, paid leave, or longer or more inclusive benefits continuation during periods of leave.

For example, current Oregon law provides 12 weeks of parental leave for eligible employees who work for employers of 25 or more. Eligible employees employed by firms of 50 or more would, of course, be entitled to 12 weeks of family leave under this act; however, nothing in this act supersedes Oregon's provision of parental leave to employees of firms with 25 or more (but fewer than 50) employees. Similar, Puerto Rico's law providing for half pay to employees temporarily disabled because of pregnancy, childbirth or related medical conditions is not superseded by this act; the act requires only that employers of 50 or more make up any difference between the paid disability period and the 12-week period provided this act so that employees are entitled to 12 weeks of paid and unpaid leave. Likewise, Wisconsin State law provisions under which employees may substitute paid or unpaid leave of any other type provided by the employee for portions of family leave or medical leave would not be superseded by the FMLA.

Section 402(a) specifies that employers must continue to comply with collective bargaining agreements or employment benefit plans providing greater benefits than the FMLA. Conversely, section 402(b) makes clear that rights under the act cannot be taken away by collective bargaining or employer plans.

Finally, section 405 sets forth the act's effective dates. Title III, creating the Commission, goes into effect on the date of the enactment of the act. Where there is a collective bargaining agreement in effect on the date of enactment, title I goes into effect on either the date the agreement terminates, or one year after the date of enactment, whichever occurs earlier. Otherwise, the act goes into effect six months after the date of enactment. The committee intends that an employee's employment with a covered employer prior to the effective date of the act is to be counted in determining whether an employee is eligible for leave under the requirements of sections 101(2)(A)(i) and 101(2)(A)(ii). Thus, an employee who has worked for a covered employer for 12 months or more prior to the effective date of the act and during the proceeding 12 months has been employed for at least 1,250 hours of service, that employer would be eligible for leave commencing immediately on the effective date of the act.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the estimate prepared by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974, submitted prior to the filing of this report, is set forth as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, January 28, 1993.

Hon. WILLIAM D. FORD,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1, the Family and Medical Leave Act of 1993 as ordered reported by the Committee on Education and Labor on January 27, 1993. this cost estimate pertains to Title, I, III, IV, and V. Title II was ordered reported by the House Post Office and Civil Service Committee. CBO is providing a separate cost estimate for Title II. The estimated costs of Titles I, III, and V are discussed below. Title IV contains miscellaneous provisions that have no budgetary impact.

Title I: Title I of H.R. 1 would allow a private sector employee up to twelve weeks of leave without pay during any 12–month period, because of the birth of a son or daughter. The placement of a child for adoption of foster care with the employee also would entitle the employee to this leave. In addition, an employee could claim this leave to care for a seriously ill son, daughter, spouse, or parent. Also, Title I would permit the employee up to 12 weeks of temporary medical leave in any 12-month period due to a serious health condition preventing the employee from performing the functions of his or her position. Title I would not apply to any employer if the total number of employees employed by that employer within 75 miles of that workside is less than 50.

Title I would allow civil suits by employees aggrieved under the provisions of this Act, and also would allow the Secretary of Labor to sue for damages on behalf of employees whose employers have violated the Act. Any sums recovered by the Secretary of Labor on behalf of such employees will be held in escrow in a special deposit fund, to be paid directly to each eligible employee at the Secretary of Labor's direction. If the Secretary of Labor is unable to pay the eligible employee within three years of receiving the money, the sum owned the employee will be transferred to the Treasury of the United States as a miscellaneous receipt. Collection and deposit of such receipts cold result in increased receipts to the federal government. While we expect the amount of any such receipts to be small, we have no basis for predicting the amount.

Any direct costs of providing this leave would be borne entirely by the private employer and would not affect the federal budget. Nevertheless, enactment of this bill would entail additional administrative costs for the Department of Labor (DOL). Costs would vary with the number of claims filed under H.R. 1. CBO assumes this bill would be administered directly by the DOL Wage and Hour Division.

The Wage and Hour Division works to obtain compliance with the minimum wage, overtime, child labor, and other employment standards, and we assume it could administer this act as well. This division handles compliance actions for approximately one million people per year, as well as fulfilling its other administrative duties. The budget for this division currently is about $95 million annual-

ly. Based on the experience of several state agencies, we expect that only a limited number of claims would be filed under the Family and Medical Leave Act of 1993. For this reason, additional administrative costs to DOL are not expected to be significant.

Title III: Title III of this bill would establish the Commission on Family and Medical Leave to study existing and proposed policies on such leave, and the potential costs, benefits, and impact on productivity of such policies on employers. Travel expenses, per diem allowances, and salary and overhead costs for an executive director and staff also are authorized, although no specific authorization level is stated in the bill. We estimate these costs could be about $300,000 per year for the two-year life of the commission. Costs of Title III most likely would begin late in fiscal year 1993 or in 1994, depending on the date of enactment, Titles I, IV, and V of the bill would take effect six months after the date of enactment, while Title III would become effective upon enactment.

Title V: Title V would allow most employees of the United States Senate and House of Representatives the same leave provided to private sector employees under Title I. CBO expects that enactment of the bill would result in Congressional employees taking more leave without pay, but that this would not result in significant costs to the employing offices.

Information regarding leave taken by employees of federal agencies indicates that Executive Branch employees who currently take leave without pay for purposes encompassed by H.R. 1 generally take it for periods of time shorter than authorized by the bill. If the experience of Congressional employees is similar to that of other federal employees, than enactment of this bill would result in more leave without pay for affected employees, although there is no basis for predicting how much additional leave would be taken.

Whether this would increase costs for Congressional offices depends on whether the offices hire temporary replacements and what salaries and benefits are paid. A General Accounting Office study of private firms' practices indicates that in many cases firms do not hire temporary replacements. While no comparable information is available regarding Congressional employees, CBO believes that, in aggregate, granting employees leave without pay for extended periods does not cost an employer more than if permanent employees continued to work-in part because sometimes temporary replacements will not be hired, and in part because, when they are hired, the salaries and benefits of temporary replacements will sometimes be less than those of permanent employees. To the extent that Congressional Offices have to hire replacement personnel, some additional costs could result from increased recruiting efforts, but we do not expect such costs to be significant.

Pay-As-You-Go Considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending and receipts. There could be increased receipts to the federal government resulting from enactment of this bill; however, CBO is unable to estimate the amount.

Estimated Cost to State and Local Governments: There is no data specific to state and local government employees available for estimating the cost impact of H.R. 1 on state and local governments.

They would be responsible for any costs associated with providing the leave specified in Title I to their employees, including employees of public elementary and secondary schools. These costs could vary with the frequency and duration of leave taken, and with the type and number of replacement personnel needed. Moreover, by the end of 1992, 11 states and the District of Columbia had enacted their own family and medical leave laws that cover employees in both the public and private sector. Furthermore, 32 states have some type of family or medical leave policies for some employees. Therefore, in these states, H.R. 1 may have less of an effect on state and local government costs than in those states with no similar legislation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mickey Buhl (226–2860) and Cory Oltman (226–2820).

Sincerely,

ROBERT D. RESICHAUER, *Director.*

COMMITTEE ESTIMATE

With reference to the statement required by clause 7(a)(1) of rule XIII of the Rules of the House of Representatives, the committee accepts the estimate prepared by the Congressional Budget Office.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the rules of the House of Representatives, the committee estimates that the enactment of H.R. 1 will have no inflationary impact on prices and costs in the operation of the national economy. It is the judgment of the committee that the inflationary impact of this legislation as a component of the Federal budget is negligible.

OVERSIGHT FINDINGS OF THE COMMITTEE

With reference to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the committee's oversight findings are set forth above in this report. No additional oversight findings are applicable at this time.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

In compliance with clause 2(l)(3)(D) of rule XI of the rules of the House of Representatives, no findings or recommendations by the Committee on Government Operations were submitted to the committee with reference to the subject matter specifically addressed in H.R. 1.

ADMINISTRATION VIEWS

Set forth below are letters from the Chief of Staff Designate to President-Elect Clinton and the Secretary of Labor concerning the need for Family and Medical Leave Act legislation.

OFFICE OF THE PRESIDENT-ELECT
AND VICE PRESIDENT-ELECT,
January 5, 1993.

Hon. WILLIAM D. FORD,
Chairman, Committee on Labor and Education, Rayburn House Office Building, Washington, DC.

Hon. CHRISTOPHER J. DODD,
Chairman, Subcommittee on Children, Family, Drugs and Alcoholism, Hart Senate Office Building, Washington, DC.

DEAR CHAIRMAN FORD AND CHAIRMAN DODD: During the last session of Congress you and your colleagues in the House and Senate worked long and hard to enact the Family and Medical Leave Act. The bill that passed both the House and the Senate was fair to families in need of leave to welcome a new child or care for an ill relative and fair to the businesses which will be providing the leave. Throughout his campaign, President-elect Clinton strongly supported the legislation which passed Congress last year.

Strengthening and supporting families has always been a priority of President-elect Clinton, and will continue to be a priority of his Administration, Allowing employees to bond with their new children, and care for their children, spouse or parents when they are ill without losing their job is a critical recognition of the importance of families and of the need to enable family members to support and care for one another.

As you know, President-elect Clinton is strongly committed to signing family and medical leave legislation into law early in his Administration. I hope that you will introduce legislation as early in the session as possible and move forward quickly to final passage.

Respectfully,

MACK MCLARTY,
Chief of Staff Designate.

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC, February 1, 1993.

Hon. WILLIAM D. FORD,
House of Representatives,
Washington, DC.

DEAR CONGRESSMAN FORD: I am writing to urge you to act quickly upon a critically important bill, H.R. 1, the "Family and Medical Leave Act of 1993." The bill would require employers with 50 or more employees to provide up to 12 weeks of unpaid leave for "eligible employees" to use for the care of a newborn or newly adopted child, for the care of a family member with a serious medical condition, or for their own illness. It also requires employers to maintain health insurance coverage and job protection for the duration of the leave, and sets minimum length of service and hours of work requirements before employees become eligible. Similar provisions also apply to Federal and Congressional employees.

The Administration strongly supports the enactment of H.R. 1, as reported by the House committees. This legislation is needed to

better balance the family and medical needs of the American workers with the demands of the American workplace, and to enhance job security and worker productivity.

Over the past 25 years the American family and the American workplace have undergone unprecedented changes, which have created a compelling need for Federal medical and family leave legislation to protect American workers. First, economic necessity and changing cultural standards—as well as greater opportunity—have resulted in large numbers of women entering the work force as contributors to family income or as sole heads of households. In 1965, about 35 percent of mothers with children under 18 were labor force participants. By 1992, that figure had reached 67 percent. By the year 2005, one of every two people entering the workforce will be women.

Also, the decline in real wages has made two incomes a necessity in many areas of this country, with both parents working or looking for work in 48 percent, or nearly half, of all two parent families with children in the United States. Single parent families have also grown rapidly, from 16 percent of all families with children in 1975 to 27 percent in 1992. Finally, with America's population aging, more working Americans are finding the need to take time off from work to attend to the medical needs of elderly parents.

As a rising number of American workers must deal with the dual pressures of family and job, the failure to accommodate these workers with adequate family and medical leave policies has forced too many Americans to choose between their job security and family emergencies. It has also resulted in inadequate job security for working parents and other workers who have serious health conditions that have prevented them from working for temporary periods. It is simply unfair to ask working Americans to choose between their jobs and their families—between continuing their employment and tending to their own health or to vital needs at home.

There also exists a direct correlation between stability in the family and productivity in the workplace. This legislation will encourage the development of high-performance work organizations. Workers who cannot take a reasonable amount of time off from work to attend to family emergencies can be expected to quit their jobs or to be absent without leave, creating unnecessary and costly job turnover, and higher absenteeism in the workplace. It is only when workers can count on a commitment from their employer that they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave is full of testimonials from some of America's most respected business leaders on the powerful productive advantages of stable workplace relationships, and on the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own illness.

While a number of enlightened employers have already recognized the benefits to be realized from a system providing for medical and family leave, data from the Bureau of Labor Statistics on private business establishments support the conclusion that private industry on the whole is not sufficiently meeting the family and medical leave needs of its workers. These data showed that, in

1991, for private business establishments with 100 workers or more, 37 percent of all full-time employees (and 19 percent of part-time employees) had unpaid maternity leave available to them, and only 26 percent of all full-time employees in such establishments had unpaid paternity leave available. The most recently available data for smaller business establishments (those with fewer than 100 workers) are for 1990, and show that only 14 percent of all those employees had unpaid maternity leave available, and only 6 percent had unpaid paternity leave available.

There is a vital role for government to play in a partnership with the private sector for transforming the American workforce, and a cost to be paid if government does not get involved. We all bear the cost when workers are forced to choose between keeping their jobs and meeting their personal and family obligations. When they must sacrifice their jobs, we all have to pay for the essential but costly social safety net. When they ignore health needs or their family obligations in order to keep their jobs, we all have to pay more for social services and medical care as neglected problems worsen.

Government must help to extend the ethic of long-term workplace relationships beyond the better-educated, better-paid segment of the workforce where high-performance workplaces have already taken root, and where family and medical leave is relatively common. This legislation will serve as a strong signal that *all* workers, not just the top tier, must be tied into ongoing networks of cooperative learning and teamwork.

Currently, the United States is virtually the only advanced industrialized country without a national family and medical leave policy. By enacting H.R. 1, the United States will join most of its keenest global competition in recognizing the social and economic benefits that family leave policies provide to workers and employers.

We also believe that this legislation will accomplish its objectives without imposing excessive costs on businesses. The General Accounting Office has estimated that this legislation will cost those businesses covered by the bill about $5 per year per employee.

The time has come to provide Federal family and medical leave protection for America's workers. Accordingly, for the reasons stated in this letter, the Administration strongly supports this legislation, and strongly supports the enactment of H.R. 1.

The Office of Management and Budget advises that there is no objection to the submission of this report to the Congress and that enactment of H.R. 1 would be in accord with the program of the President.

Sincerely,

ROBERT B. REICH.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The amendment made by the Committee on Education and Labor to H.R. 1 made no changes to existing law under its jurisdiction. For changes to existing law made by the Committee on Post Office and Civil Service, see the report filed by that committee.

MINORITY VIEWS ON H.R. 1

The legislation subject to this report, stated simply, constitutes misguided public policy. It attempts to address perceived societal problems arising from changing workforce demographics with a sledgehammer, flawed approach which will ultimately be counterproductive to the interests of both employers and employees.

It is worth emphasizing that this legislation cannot be considered in isolation. The employment requirements of the Americans with Disabilities Act (ADA) became effective on July 26, 1992, and the Civil Rights Act of 1991 became effective on November 21, 1991. The ADA has been called the most significant change in workplace law in many years and, with passage of the Civil Rights Act, punitive and compensatory damages (capped at levels ranging from $50,000–$300,000, depending on the size of the employer) have been added to the arsenal of plaintiffs' lawyers in labor law litigation for the first time. Now Congress, in its infinite wisdom, is about to pass another law, H.R. 1, imposing still more costs on employers. Closely behind the Family and Medical Leave Act, waiting in the wings of the Committee on Education and Labor, is a massive reform proposal amending the Occupational Safety and Health Act, a bill to prohibit the permanent replacement of striking workers, still another bill to add punitive and compensatory damages to litigation under the Employee Retirement Income Security Act, and, for just a little extra spice, a bill to completely eliminate the caps on damages under the Civil Rights Act mentioned above. Mandated health insurance may be added to the list, and no doubt other initiatives will also come to the forefront.

Where is it all to end? In a time of 7.3 percent unemployment (9.3 million Americans are looking for work) increasing numbers of layoffs by the giants of industry, such as General Motors, IBM, and Sears and an intensely competitive international marketplace, we must think before we act. Congress cannot continue to layer one piece of legislation over another into perpetuity; some choices have to be made, and not every interest group with a concern can, or should, be satisfied through the heavy hand of federal intervention. The business community can withstand only so much, and all the good intentions in the world for workers—which we all share—will mean nothing to a worker without a job.

Obviously, this does not mean that no new laws governing the workplace should ever be passed. It does mean, however, that Congress should only enact laws which address truly pressing societal needs and which do so in the least costly manner possible. H.R. 1 does not meet this test.

H.R. 1 is not a bipartisan effort. Thirteen of the fifteen Republican members of the Committee on Education and Labor voted against H.R. 1. Numerous objections were raised against the bill at the Committee markup on January 27, 1993, and many amend-

ments were offered by Republicans to improve the bill. Unfortunately, in raising partisanship to new levels, all of these amendments were rejected by the Majority with only cursory explanation. A list of these amendments, with explanations, is attached to these views.

I

Need for the legislation

H.R. 1 is a legislative initiative in search of a problem to solve. Proponents of the bill believe that Congress must impose a federal mandate requiring employers to provide unpaid family and medical leave for two reasons: (1) The American public is demanding such leave so that workers, particularly women, can more easily meet the demands of both home and work, and (2) American businesses are not addressing that demand voluntarily.

We disagree with both points.

While both sides in this debate can cite surveys in support of whether or not there is a great demand outside Washington, DC, for this legislation, most telling from our viewpoint is the fact that we have heard very little from our respective constituents demanding that Congress pass this legislation or otherwise indicating that their employers are not—in one way or another—accommodating their family and medical leave needs. Polls appear to reflect this lack of urgency. A 1991 Penn & Schoen survey found that 89 percent of 1,000 respondents, when asked if they would rather have the federal government mandate benefits or have that decision left up to the employer and the employee, stated that their preference is to have employee benefits decided privately. A 1990 poll conducted by the Employee Benefit Research Institute (EBRI) and the Gallup Organization found that only 1 percent of 1,000 respondents listed parental leave as their most valuable employee benefit. A 1989 poll by the Washington Post revealed that only 3 percent of respondents thought that making it easier to take time off following birth of a child should be a top priority for the federal government. A 1989 Harris survey found that 73 percent of employees feel that their employer makes adequate provisions for both the regular and emergency needs of working parents. Seemingly contradictory, a 1992 EBRI/Gallup poll found that 77 percent of those surveyed said employers should be required to provide an unpaid leave of absence for employees upon the birth or adoption of a child, but this percentage dropped to 20 percent when asked if the leave should be as long as 10 to 14 weeks. H.R. 1, of course, provides for leave of up to 12 weeks and, moreover, extends far beyond leave for birth or adoption, also covering care for a child, spouse, and parent, and employee disability leave. Hence, the poll, if anything, indicates a lack of support for legislation of the breadth of H.R. 1.

The claim that employers are not increasingly responsive to their employees' family needs—in one way or another although not necessarily in the same manner as rigidly mandated by H.R. 1—is also belied by other data. Thus, Michael Losey, President of the Society for Human Resource Management (SHRM), testified on January 22, 1993, before the Subcommittee on Labor-Management Relations, as follows:

> Changes in the workforce demographics and employment practices are reflected in SHRM's "1992 Work and Family Report," which found that over the last four years, the implementation of new and creative employee benefits designed to meet the work and family needs of employees has dramatically increased. For example, we found that the percentage of companies providing child care services has grown almost threefold over the past four years, and overall, 6 in 10 companies now provide parttime work options, with nearly as many providing flextime. In addition, 18 percent offer work at home programs, 27 percent offer job sharing, and 23 percent offer compressed work weeks. In 1988 and again in 1992, our surveys showed that the majority of SHRM members supported family and medical leave as a benefit, but that they did not endorse a federal mandate. The majority of our members still would prefer to design work and family benefits themselves versus a one-size-fits-all federal mandate.

A 1991 Bureau of Labor Statistics survey of employers with 100 or more employees found that 96 percent of employers provide paid vacation leave, 67 percent provide paid sick leave, with 37 percent providing unpaid maternity leave. Of course, as under H.R. 1, vacation and sick leave can generally be taken for illnesses and other family needs. The survey also revealed a host of other benefits provided by employers, ranging from medical care (83 percent) to dental (60 percent) to life insurance (94 percent) to others. While the proponents of H.R. 1 may not see these other benefits as being responsive to the needs of employees, we think that this rather myopic view would not be shared by the employees involved. With regard to smaller employers, a 1991 Gallup survey (discussed a statement submitted by the National Federation of Independent Business to the Subcommittee on January 26, 1993) found that 93 percent of small business owners contacted already offer some form of family and medical leave and that 94 percent granted their employee's last request for such leave. Further, it should be noted that the General Accounting Office (GAO) stated in earlier testimony before the Subcommittee that many employers without formal policies no doubt tend to accommodate employees on an ad hoc basis. We agree.

Demographic trends in the workforce will ensure that such benefit practices will become even more prevalent in the workplace if for no other reason than to attract the best of the new entrants into the workforce. According to the U.S. Department of Labor's "Workforce 2000" study, over 60 percent of new entrants into the labor force will be women. Simultaneously, the lower birthrate of the 1970s is resulting in a shrinking labor pool. Employers, therefore, will face intense competition to recuit and retain workers, most of whom will be women. Simple principles of supply and demand—without government involvement— will require employers to develop benefit/leave packages responsive to the needs of their employees.

Scope of the legislation

This legislation, by the Majority's own estimates, will cover only 50 percent of the Nation's workforce and only 5 percent of its businesses. Moreover, only those individuals who would be able to survive without a paycheck will be able to use its generous leave provisions. These workers—those in the larger companies and those in the upper income brackets—are those with the least need of protection, yet this is the precise group targeted by H.R. 1. It seems that the Congress has fought a long hard battle to accomplish very little other than providing an already favored class with more. Yet, the attendant costs of the bill and its other negative impacts, discussed below, remain. Indeed, it takes little imagination to predict that these will disproportionately fall on those class workers not so fortunate to be able to take leave under this legislation. It is the workers who are left behind who will be forced to compensate through harder work or lower wages for the lower productivity caused by absent workers. In short, one must ask whether this legislation will have any practical beneficial effect. A January 1993 editorial in USA Today took a similar view:

> The idea looks good at first glance. It would require some employers to provide up to 12 weeks of unpaid leave per year for an employee's serious illness, or for care of a newborn, newly adopted child or ill family member. Health-care benefits would continue, and the same or equivalent job would be guaranteed.
>
> But look closer:
>
> For those who think family leave should be a right, it is a timid measure. It would protect only a handful of the most privileged workers. Only those who can afford to take leave without pay could enjoy the full advantages of the benefit, since it includes not even a minimal amount of paid sick leave.
>
> Even if you can afford to miss a paycheck, you might not be covered. The bill applies to only 5 percent of companies—those with 50 or more employees—and leaves out from 40 percent to 50 percent of workers.

Costs

What degree of economic burden would the Family and Medical Leave Act of 1992 place on employers? Supporters of the bill were pleased when GAO, in testimony before the Education and Labor Committee in 1987, estimated that the legislaiton would cost American businesses "only" approximatley $188 million annually. However, proponents fail to note that GAO increased this estimate by nearly 60 percent in 1989, to $330 million annually, upon the assumption that leave to care for an ill spouse would be included. (of course, H.R. 1 includes such leave.) GAO now states that these estimates should be increased to reflect the escalating costs of health care, for a total, current to American businesses of $674 million annually (letter dated February 1, 1993). Further, even this substantially higher estimate admittedly does not take into account a number of other critical cost factors, as discussed further below.

In contrast to the GAO estimates are those by the Small Business Administration (SBA). The SBA estimated in 1991 that six weeks of unpaid maternity and infant care leave alone would cost $612 million dollars a year, increasing to $1.2 billion to $7.9 billion if 12 weeks were taken, the lower figure assuming all leave as unpaid. Of course, H.R. 1 covers many other types of leave, and costs would be increased accordingly. A study by a senior economist on the Joint Economic Committee estimated that "new labor costs associated with the mandate are estimated to exceed $3.3 billion in the first year alone, translating into nearly 60,000 lost jobs. The disemployment effects will disproportionately effect America's least skilled, lowest paid workers." These are alarming conclusions.

Proponents have recently touted a 1992 study by the Families and Work Institute which concluded that providing parental leave is more cost-effective than terminating employees. Therefore, they argue that H.R. 1 will actually save employers money and that Congress is helping the employer community to become more competitive by passing this bill. However, it is one thing to say that providing leave is more cost effective than terminating employees and hiring replacements; it is quite another to say that the rigid structure of H.R. 1 will result in a cost savings to the employer community; no doubt this explains the consistent employer opposition to this legislation. Further, the rather self-evident conclusions of this study demonstrate exactly why this country does not need a federal mandate. That it makes good business sense to work with employees to address their family needs is exactly why employers do so voluntarily—whether through formal policies or on an ad hoc basis.

But it is the GAO study upon which the proponents of this legislation primarily rely, so it must be emphasized that its methodology and estimates were faulty for several reasons:

(1) Cost Other than Health Care: Most importantly, GAO's cost estimates reflect only the cost of required continuation of health insurance coverage. Even accepting GAO's estimates, it is important to note that other costs have been ignored. Based on its limited survey of 80 firms in only two marketplaces, GAO determined that no costs would be incurred as a result of absences of employees on leave, apparently feeling that no losses in productivity would occur, that temporary replacement workers could be hired at costs comparable to that of the employee and, where no replacement was hired, that the employee's work could be assumed by other employees on the job. The GAO analysis appears to assume that workers are completely fungible and can be placed in and out of different jobs without difficulty, like widgets, without training or job acculturation.

No conclusion has been more strongly disputed by the business community—the very people with actual experience in managing workforces and producing products—on the basis that it ignores significant costs associated with the recruitment of a new temporary replacement worker, the training of the replacement worker, the overall sub-standard performance during this period of training and adjustment, and the resultant lower levels of productivity.

Further, if no replacement worker is hired, the work of the employee on leave either is not performed or must be undertaken by fellow employees, often with accompanying overtime wage costs. Either situation results in reduced productivity which will evidence itself in lower rates of production or a lesser quality in goods produced. By ignoring these costs, the GAO assumes, in short, that most companies normally operate at such levels of inefficiency that a worker here or there will not be missed and that his or her work can easily be spread out among other workers without impairing output. While these assumptions may be true about some types of jobs and some companies, surely they do not typify the American workplace.

A study by the American Society for Personnel Administrators (ASPA) [now the Society for Human Resource Management (SHRM)] also provides further insight into these hidden costs over and above health care coverage, estimating that the cost of recruiting a new employee usually amounts to about one-third of the new employee's annual salary, that the cost of training a new employee usually amounts to about 10 percent of the new employee's annual salary, and that the cost of productivity down time (the time lost while the new employee learns the job) often amounts to 50 percent of the first year's salary. Using the ASPA guidelines, the approximate cost of replacing an employee earning an annual salary of $12,000 would amount to $4,000 in recruitment expenses, $1,200 in training costs, and $6,000 in lost productivity—a total of $11,200.

GAO, in its report, estimates that 1,675,000 employees would take advantage of a parental leave law within the first year of enactment. GAO also estimates that 30 percent of those workers would be replaced with temporary workers during their leave of absence. If only 30 percent of the 1,675,000 employees were replaced during their absence, the cost to employers (based on the above calculations from the ASPA) just for temporary replacement workers could conservatively be estimated at $56,280,000. This estimate, of course, does not cover losses in productivity or overtime wages which would likely result when an employee is not replaced. These costs defy even theoretical dollar quantification but are, nonetheless, significant.

(2) Definitions: GAO found the critical definition of "serious health condition" in the bill unworkable for the purposes of estimating costs under its survey. It therefore defined the term as that requiring thirty-one days of bed rest for purposes of care of an ill child, spouse, or of the employee himself and, for the purposes of estimating cost for leave for the care of an ill parent, as that requiring long-term assistance requiring daily assistance with personal hygiene, mobility, or taking medication. In fact, the criteria provided for leave for a "serious health condition" under H.R. 1 (as discussed in more detail below) is so broad and general that it would apparently allow leave for many less serious conditions not covered by GAO's definition, greatly increasing costs. Indeed, the experience in Wisconsin, where the definition of "serious health condition" in the State parental leave statute is identical to that in H.R. 1, shows clearly that thirty-one days of bed rest have not once been the criteria for triggering use of medical leave. Indeed, care of

a child with an ear infection was held to meet the statute's definition.

(3) "Key Employee" Exemption: GAO also seriously misinterpreted the scope of the so-called "key employee" exemption of the bill, assuming it completely exempts from coverage employees who are among the highest paid 10 percent of employees in the employer's workforce. In fact, the relevant provisions of the bill are much more limited, only exempting such employees from the right to reinstatement if denial of such reinstatement would be necessary to prevent "substantial and grievous economic injury to the employer's operations." Further, even assuming that an employee met this rigid criteria, he or she would still be entitled to health benefit coverage—the very costs which form the basis of the GAO estimates.

(4) Care for New Children: GAO assumed that only women would take leave to care for new children; H.R. 1, of course, provides for paternity leave. Similarly, although perhaps less importantly, GAO also apparently viewed the "new child" leave provisions as limited to birth or adoption. In fact, the provisions are broader, also including children placed into foster care.

(5) Leave Offset: The GAO cost analysis assumed that women will take the full amount of leave allowed under the bill, but that about 6 weeks of this leave will be their available paid vacation, sick, and disability leave. However, the legislation limits the substitution of an employee's paid leave depending on the circumstances under which leave is taken, such that an employee would not be able to offset leave taken for birth, adoption, or placement of a foster child with sick or disability leave.

(6) Future Costs: As noted above, GAO now estimates that its 1989 estimate should be increased to $674 million annually (letter dated February 1, 1993). What will be costs be next year? in two years? in four years?

(7) Litigation Costs: These costs will probably be enormous. In this regard, the experience of the U.S. Department of Labor (DOL) in administering the Veterans' Reemployment Rights (VRR) Act is instructive. The VRR Act, sharing similarities to the Family and Medical Leave Act, provides that an employee taking leave to serve on active duty in the military, as a reservist, or as a member of the National Guard must be offered reinstatement to his or her same position, or to a comparable position, following service. From 1981 through 1990, DOL processed approximately 17,500 cases under this statute. Obviously, the number of employees covered by H.R. 1 is infinitely greater than that of the VRR Act. The implications for future litigation are clear.

(8) Public Costs: While beyond the scope of the GAO study, it should also be noted that public sector costs will also be significant—either in terms of additional DOL enforcement and administrative personnel or in terms of reduced enforcement of current programs as personnel are shifted to meet the demands of this legislation. Of course, as all state and local government personnel are covered by the same provisions as the private sector, all the costs associated with granting leave will have to be made up either with cuts in other programs and services or through increased taxes.

In sum, the probable costs of this legislation will be considerable, and certainly much more than its proponents claim. In a time of continuing competitive difficulties, Congress has the responsibility to enact laws which create a positive economic climate, not laws with uncertain benefits which will further burden American business and reduce job growth in this country.

Flexibility or Mandate

It is important to note that the trend in employee benefit programs for the past decade has been away from providing a single benefit program to which all employees must subscribe and, rather, towards serving up benefits "cafeteria style." Recognizing that a business can allocate only a certain dollar amount per employee for benefits, cafeteria plans offer a broad range of choices which permit each employee to select those benefits that meet his or her individual needs.

In sharp contrast to this trend, H.R. 1 would legislate against flexible benefits by requiring that part of each employee's benefit "budget" be spent on a benefit that the employee may neither want nor need. Why should a single employee, or a married employee with no children, be forced to accept a benefit that will never be needed, while at the same time forfeiting a benefit that may be needed? Not surprisingly, according to the "Employee Attitude Survey on Flexible Compensation" (Swinehart Consulting, Inc., 1989), 91 percent of women and 80 percent of men prefer flexible plans as opposed to those with fewer standard, required benefits.

The adverse impact of the mandated, fixed benefits of H.R. 1 on the availability of other benefits (or even wages) to employees has repeatedly been touched upon in testimony before the Subcommittee throughout the debate on parental leave proposals. Dr. Earl Hess, founder and president of Lancaster Laboratories, testifying on behalf of the U.S. Chamber of Commerce on February 7, 1989, may have summarized this issue best:

> [A]ny mandated benefit is likely to replace other, sometimes more preferable, employee benefits. A mandated benefit, regardless of how worthy it may be, does not increase the employee benefits "pie"; rather, it redivides it in a manner dictated by powerful special-interest groups. *If one employee benefit is required, then another benefit, perhaps one more greatly desired by the employees of a particular company, must be eliminated or reduced to offset the costs associated with the new mandated benefit.* Employee benefit packages differ among employers according to their affordability and the needs of individual employers and their employees. [Emphasis added.]
>
> Parental leave deprives employers and employees of the right to be flexible in negotiating alternative benefits, such as long vacations or better medical insurance. All employees—male, female, young and old—will be subject to a uniform parental leave law, whether they are new parents or not, whether they like it or not, or whether they can take advantage of it or not. Federal legislation ignores the irrel-

evance of benefits that are meaningful only to a portion of the workforce.

Dr. Marvin Kosters also addressed the issue of the benefits "pie" in the context of overall compensation when he appeared before the Subcommittee on February 28, 1991:

> The benefits that are mandated are not free; someone needs to pay their costs. * * *
>
> When employers are legally required to pay the cost of providing a new benefit, they can be expected to react to the benefit mandate. The most obvious way for employers to adjust is to reduce cash wages. * * * *There is strong evidence that this is essentially what happens.* [Emphasis added.]

Echoing Dr. Kosters' testimony, a 1991 Gallup survey of small business owners discussed in a statement submitted to the Subcommittee by the National Federation of Independent Business on January 26, 1993, found that, if the Family and Medical Leave Act is enacted, 46 percent will be more likely to reduce the number of low-skilled jobs in their workforces and 55 percent will be more likely to reduce other benefits, such as paid vacation, unpaid personal leave, and health insurance. In short, mandated benefits help, if anyone, only the few employees who fall within the legislated criteria, while benefits available to other employees diminish.

Expansion of Legislation

If H.R. 1 is enacted, it would be difficult for Congress to resist future demands to impose paid mandated leave on employers, vastly increasing business costs and ultimately societal costs. H.R. 1's predecessors required that a Commission be established to study the possibility of mandating paid leave, and—while this provision is not included in H.R. 1—it is highly unlikely that this goal has been abandoned. Indeed, testimony presented to the Committee on March 5, 1989, by the Women's Legal Defense Fund assures us that this goal has simply been placed in abeyance:

> If we truly had a national policy of accommodating families and work, we might have a whole range of employer requirements, tax incentives, and other public policy mechanisms to ensure the effectuation of that policy. At the very least, employees would have the right to "paid," job-guaranteed leave. * * *

Similarly, just as there will be future demands for paid leave, there will be future demands to expand the types of leave required by this bill to cover other groups. History has demonstrated that Congressional programs virtually always expand, rarely contract.

Discrimination

Finally, it is an unfortunate reality, but a reality nonetheless, that this legislation is likely to result in increased discrimination against women in hiring and promotions. The Subcommittee heard testimony on this issue during the debate on parental leave. Ms. Cynthia Simpler, Personnel Manager for James river Corporation,

testifying on behalf of ASPA (now SHRM) on February 7, 1989, cogently discussed this probable result:

> There are other, less apparent costs involved as well. Since working women will be viewed as the most likely candidates for parental leave, hidden discrimination will occur if this bill becomes law. Women of child-bearing age will be viewed as risks, potentially disrupting operations through an untimely leave. Anyone who has had a secretary out on maternity leave knows how chaotic the office is when an inexperienced temp steps in to take her place. Who takes care of the territory when a sales representative drops out for ten weeks? Who will close the books if the only accountant in the plant goes out on parental leave? Unlike men, women must still constantly prove that they can handle the responsibilities of work and family at the same time. If this legislation passes, it will only reinforce the prejudices which already exist. Consequently, we will find "employment opportunities" in less critical, lower paying jobs.

State and International Comparisons

Proponents of H.R. 1 argue that the States are imposing leave requirements on employers and that, therefore, a federal law would present no great inconvenience. They also argue that the United States is grossly behind foreign countries in protecting workers in this area. These arguments are based on incorrect factual premises and are unpersuasive in any case.

A careful analysis of the State statutes shows clearly that the provisions of H.R. 1 are far more expansive than all but a very few State laws. For example, a September 1992 DOL study found, with regard to the private sector, that "no State has chosen to pass state legislation that is as broad in scope and coverage as H.R. 2" [H.R. 1's predecessor in the 102nd Congress]. That study is attached. Oregon, California, Connecticut, Vermont, New Jersey, the District of Columbia, and Rhode Island appear somewhat comparable in terms of weeks and categories covered, but even here precise comparisons must be made carefully. For example, California provides 16 weeks but spread over two years, the District of Columbia 16 weeks but over 2 years, and Rhode Island 13 weeks but over 2 years. (The Vermont and New Jersey laws are very close to the requirements of H.R. 1, but there are also differences. For example, New Jersey provided for a 3-year phase-in for employers with 100 employees to those with 75 to those with 50; Vermont's law has a considerably tighter definition of serious illness.) Further, according to the study, 28 states have no private sector family leave requirements at all. Given that this is the majority of the 50 states, we are unsure what lessen is to be learned here.

It may be worth noting, at this juncture, that it is the patchwork nature of the State laws and their general lack of comparability to H.R. 1 which renders immediately suspect any "studies" comparing the impact of those laws on the business community to that which could be expected under H.R. 1. For example, one study mentioned as demonstrating that State laws have no adverse impact on em-

ployers and, therefore, that H.R. 1 would have little impact ("Beyond the Parental Leave Debate," conducted by the Families & Work Institute of New York) looked at only four States and only at the birth or adoption aspects of these laws. As H.R. 1 sweeps much broader, there is little that can be learned from such studies. One must also ask, in considering such studies, whether the laws have applied to the business community in question for a long enough time to make any reasonable evaluations of impact. Many State leave laws have been enacted only relatively recently.

Comparisons to foreign laws are even less meaningful. First, the argument ignores the fact that every country has its own set of social values and needs. Indeed, we suspect that there are many aspects of the laws of these countries that the proponents of H.R. 1 would not like to see incorporated into the laws of the United States; yet that is where their logic would take us. Our point is only that analogies from foreign counties with different cultures and economies have little persuasive value as to what policies are proper for the United States.

Second, the comparison, as with state laws, to H.R. 1 is invalid on its face because few countries have any laws approaching the breath of H.R. 1 although many do have simple parental leave. A study by the Congressional Research Service ("Family and Medical Leave: A Worldwide Survey"), dated January 1993, found that "only a limited number of the countries surveyed provide a special temporary leave for the care of a child or family member," and even in these countries the leave provided is much shorter than that provided under H.R. 1 for such care, particularly in the case of leave for relatives other than a child. Similarly, a study undertaken by the Chairman of the Small Business Committee found that neither leave for spousal care nor leave for elder care is "provided in leave programs in any other nation." (John LaFalce, Congressional Record, October 26, 1990). Of course, H.R. 1 provides for exactly such care.

Third, it might be asked whether we wish to draw upon the practices of European countries which have demonstrated job growth far behind that of the United States in any case. While cause-and-effect relationships are always difficult to draw precisely, the possibility that rigid job-related mandates adversely effect growth was raised by Dr. Marvin Kosters of the American Enterprise Institute during testimony before the Subcommittee on February 28, 1991:

> * * * During the 1980s, job creation in Western European countries was very weak compared with the United States and their unemployment rate was higher. Many analysts were led to question whether the extensive protections and requirements in European labor markets left them with too little flexibility for labor market adjustment and new job creation. * * *

None of this is to say that there are not gaps in coverage for family and medical leave in this country or that tragic examples of abusive treatment do not exist. But, given the growing responsiveness of employers and the likelihood of this trend continuing, we believe that Congress should require more than anecdotal information, relatively isolated examples of problems, and questionable

analogies to practices in foreign countries before it enacts virtually unprecedented legislation imposing mandated benefits.

II

Even assuming that some form of federally mandated family and disability leave is appropriate, we would continue to oppose enactment of H.R. 1 because it remains a legislative initiative that is fundamentally flawed. The structural framework that it would establish for the administration of the required benefits would be unworkable, as a practical matter, would fail to allow for legitimate needs of employers to manage their work forces in the orderly fashion needed to produce a quality product, and would likely lead to extensive litigation as employers and employees disagree over the proper interpretations of the many vague provisions in the bill. Unfortunately, approximately 30 amendments offered over the various markups of this bill to address these problems have been continually rejected by the Majority. (As noted above, a summary, with explanations, of the amendments offered at the January 27, 1993, markup is attached.)

While it is impossible here to discuss all of these problems in detail, the most significant can be summarized under the following areas:

(1) Definitions: The definitions of "serious health condition" and "health care provider" are particularly critical to the implementation of H.R. 1's requirements. For example, an employee may take family leave in order to care for a child, spouse, or parent who suffers from a "serious health condition" and may take medical leave when suffering from a "serious health condition" that renders him or her unable to perform the functions of his or her position. Further, an employer may require certification by a "health care provider" as to the existence of the "serious health condition" claimed as a basis for leave and may also condition an employee's return to work (when on disability leave) upon a certification by the employee's return to work (when on disability leave) upon a certification by the employee's "health care provider" that the employee is able to resume work. Despite the key role that these two concepts play in the implementation of this legislation, they are defined in grossly broad, general terms which will lead to misunderstandings between employers and employees as to when leave is appropriate, to resultant litigation, and, frequently, to abuse of the rights provided by this bill. In brief, a "serious health condition" may be any physical or mental condition which involves inpatient care in various facilities or "continuing treatment by a health care provider." [Emphasis added.] What constitutes "continuing treatment" is less than clear, and apparently even totally voluntary surgical procedures, such as cosmetic surgery, would be covered. And while a limited definition of health care provider, such as a licensed medical physician, might provide some assurances that only truly serious conditions would qualify for leave, in fact, the applicable definition is much broader, including a physician or "any other person determined by the Secretary of Labor to be capable of providing health care services." No criteria to guide the Secretary's discretion is specified. One might wonder what expertise the Secretary of

Labor has to apply in evaluating medical service qualifications, and which individuals will, in fact, be ultimately approved by DOL.[1]

Notably, as already discussed, even GAO—upon which the proponents of H.R. 1 so frequently rely—was unable to utilize the definitions provided by H.R. 770, the predecessor to H.R. 1, to calculate costs and adopted its own criteria for "serious health condition" leave. GAO expressly noted the difficulty of defining serious health condition under the bill:

> There is another matter related to the cost of this legislation that warrants attention, namely the need to clarify the definition of serious health condition under the provisions of the bill permitting leave to care for seriously ill children and temporary medical disability. Currently, there is substantial room for *varying interpretations.* For example, the cost of the bill would increase by nearly $120 million if serious illness is assumed to be 21 days or more of bed rest rather than 31 days, as in our estimate. [Emphasis added.] [GAO Report of November 10, 1987, p. 4]

In sum, GAO was stating, and we agree, that the critical definition provided by the bill is unworkable and so elastic as to be meaningless. This key problem alone is fatal to H.R. 1.[2]

(2) Broad Eligibility for Leave/Benefits; Exemptions: Virtually all employees of a covered employer, regardless of the nature of their work or the impact of their absence, will be eligible for family and medical leave under H.R. 1. Any employee who has worked one year for the same employer and has worked at least 1,250 hours (about 24 hours a week) qualifies. Thus, after one year of part-time work, an employee would be eligible for up to 12 weeks of leave each year thereafter. Unfortunately, the broad criteria established by the bill governing availability of leave makes the likelihood of actual use of most or all of such leave more probable than might first appear. The problems with the definitions of "serious health condition" and "health care provider," upon which entitlement for use of family leave and medical leave hinge, have already been discussed. Further, although a "health care provider" must certify that the leave is "needed," there is no requirement that exigent circumstances exist before it is taken. Eligibility for the leave is triggered by the "serious health conditions of spouse or parent" or by "the birth, adoption, placement in foster care" or "serious health condition" of a "son or daughter." Thus, an employee could apparently be on leave for 12 weeks "in order to care for" a son, daughter, spouse, or parent even though the aid of the employee was not actually necessary in the true sense of the word—such as when another relative or a professional attendant is tending to the needs of the ill individual. And, of course, an employee could be on leave for 12 weeks because of the birth, adoption, or placement in

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[1] Although included in earlier versions, this provision was not included in H.R. 2, as reported by the Committee in the 102nd Congress. Inexplicably, it has now been reintroduced into this legislation.

[2] Wisconsin's law defines "serious health condition" in virtually identical terms as H.R. 1. Not surprisingly, there has already been considerable litigation over the meaning of the term. In H.R. 1, the definition is slightly improved over that in the legislation considered by GAO (H.R. 770, 101st Congress), in that "continuing supervision" was dropped as a qualifying criteria. But this change hardly resolves GAO's concerns.

foster care of a son or a daughter even though an able-bodied spouse is at home to care for the child—whether the spouse was home on leave under this legislation from his or her place of employment or was simply unemployed. In sum, many factual situations will qualify employees for the full 12 weeks of leave per year provided by this bill; emergency, pressing, or unusual circumstances need not exist.

Certain "key" employees are exempt for reinstatement rights under the bill but remain eligible for continued health benefits coverage. As already discussed above, this exemption—the only one in the bill—is extremely limited, as "key" employees must be among those whose pay is the highest in the workforce and those whose reinstatement would cause substantial and grievous economic harm to the employer. It would seem that an exemption tied to the nature of an employee's work, the availability of replacements, and the impact of the employee's absence would be more realistic.

Finally, it is worth emphasizing that, while the bill contains few employee exemptions, it contains even fewer employer exemptions. All types of employers above the 50-employee threshold, including State and local governments, are covered—regardless of the nature of their operations. Hospitals, police departments, firefighters, specialized private sector services—large or small—must be prepared (possibly at a moment's notice) to fill a position, however critical, with a temporary employee or do without the work of that employee. The Majority has included specially tailored provisions to address the needs of elementary and secondary schools but has left all other, however unique but less favored, workplaces to fend for themselves.

(3) Employer Control of Leave: Stated simply, H.R. 1 allows employees almost unrestrained discretion as to when to take leave, how long to stay out on leave, and when to return, rendering employer workforce planning extremely difficult. "Serious health condition" leave can be taken in intermittent segments of time or under a "reduced leave schedule" so long as "medically necessary." While an employer can require that medical necessity be certified by a "health care provider," the broad definition of that term, discussed above, undermines that protection. Proponents of H.R. 1 will argue that the bill requires employees to give 30 days' notice of foreseeable leave, or as much notice as "practical" if such notice is impossible due to certain conditions, and to "make a reasonable effort to schedule" medial leave without disrupting "unduly" the employer's operations, subject to the approval of the employee's health care provider. However, the bill is silent as to what these fluid concepts mean and, more importantly, as to any sanctions, such as denial of leave, an employer could impose upon an employee for failing to meet these vague obligations. Similarly, the bill requires the employee to report periodically on his or her "status and intention" to return to work but says nothing about the right to require specific advance notice of return or what, if anything, the employer could do if the employee changes plans and returns early. The "obligations" are, therefore, essentially meaningless except in the most outrageous cases of noncompliance by an employee. Would any employer risk double back pay liability, attorneys' fees,

and expert witness fees in second guessing how these terms would be interpreted by the jury or the DOL?

It should be noted that previous versions of this legislation always required an employer to agree to a "reduced leave schedule." This requirement was eliminated at the January 27, 1993, markup, creating an entirely new troublesome issue under the legislation, never subject to hearings or otherwise considered, and markedly expanding employee leave rights to uncertain dimensions.

(4) Reinstatement and health Benefits Rights: Under H.R. 1, the employer must restore an employee to the same position or to an equivalent (in all terms and conditions of employment) position, whenever, quite literally, the employee decides to return from leave, subject only to the right of the employer to request medical certification from the employee's health care provider of the employee's ability to resume work when returning from personal disability leave. The employer clearly has no discretion to delay reinstatement for a short period of time or for any time at all, much less until an equivalent position becomes available. It is not hard to imagine the difficulties this would pose for an employer attempting to decide whether a vacated position should be filled on a temporary or permanent basis or held open pending the uncertain return of an employee.

Of course, during leave, health benefits coverage must also be continued as if the employee remained on the job. However, while the implicit quid pro quo to this continued coverage is the employee's return to work, there is no practical mechanism by which the employer could recover benefit costs from an employee who chooses, even voluntarily, not to return to the position at the end of the leave period. (A provision which allow employers to sue employees for premiums is meaningless, as rarely will recovery of premiums justify the cost of litigation.) The employer cannot ask an employee to guarantee his or her return); indeed, the employee has every incentive not to state his or her intentions in order to secure the longest possible medical coverage. The inequity of this arrangement, together with the requirement that the employee be reinstated immediately upon return, is best exemplified by a related case study of an employer, as cited by the National Federation of Independent Business in its February 7, 1989, testimony before the Subcommittee:

> We recently had a young woman who requested three months' maternity leave which we granted. In order to hold her job, we employed a temporary employment service to fill this job as secretary/receptionist. During the leave, we paid all benefits. At the end of the leave, the individual informed us of her decision not to return to the labor force. In other words, we went through a period of inefficiency and delay in being able to seek and train a replacement (as well as a monetary outlay to cover fringe benefits) for an employee who did not return.

Other problems are also evident. For example, it is the apparent intention of the proponents of H.R. 1 that the 18- to 36-month continuation of health care coverage requirements under Title X of

the Consolidated Omnibus Budget Reconciliation Act (COBRA) would not begin until after it is clear that the employee would not be returning to work, rather than to allow computation of the continued coverage period from the time leave began. Further, it is unclear how an employer who maintains a health care plan to which an employee contributes through payroll deductions, a common arrangements, would collect payments from an employee on unpaid leave. Could an employer require cash payments before or during leave and terminate coverage when such payments were not forthcoming, or must the employer make the employee's payments and await the uncertain return of the employee to be reimbursed? We assume that the employee could be required to make payments (or the employer could terminate coverage if such payment were not forthcoming), but the legislation is not clear. These are real problems which are not properly addressed by this legislation; hopefully these problems will be addressed reasonably in regulations.

(5) Damages/Enforcement: H.R. 1 has been considerably improved over past versions of the legislation considered by this Committee. Damages have been reduced from potentially quadruple lost backpay and benefits to double cost backpay and benefits, with interest, plus attorneys' fees and expert witness fees. Further, the enforcement structure of the bill has been simplified; however, it still retains the same two enforcement pillars of H.R. 2, as reported in the previous Congress—that is, DOL enforcement and private law suits, with jury trials. Proponents will claim that the Fair Labor Standards Act (FLSA) is simply being followed, but the FLSA does not typically allow for recovery of lost benefits, nor does it allow for expert witness fees or interest where double lost backpay is awarded. Indeed, that these changes in damages and enforcement procedures are being viewed as an "improvement" at all suggests more about the extreme nature of prior versions of the legislation than about the merits of this new version.

We are also concerned that, while DOL has been given, in H.R. 1 as reported, an additional 60 days to issue "such regulations as are necessary to carry out this title," the effective date (6 months from the date of enactment) has not been changed. The 2-month delay in issuance of regulations will give employers two months less time to decipher the regulations in order to determine their compliance responsibilities.

Finally, while the bill now addresses the FLSA "pay docking" issue by providing that a salaried employee may be given unpaid leave under the Family and Medical Leave Act for absences of less than a day without resulting in that employee being considered as hourly, and thus eligible for overtime pay, we hope that Congress will examine this whole issue on a broader basis. A national policy that prohibits the docking of pay for a half day of a round of golf or a shopping trip (under the FLSA) but permits the docking of pay for medical care (under the Family and Medical Leave Act) makes little sense to us.

(6) Effect on State and Local Laws: H.R. 1 provides that "[n]othing in this Act or any amendment made in this Act shall be construed to supersede any provision of any state or local law which provides *greater family or medical leave rights* than the rights established under this Act or any amendment made by this

Act." [Emphasis added.] This provision is an invitation to litigation and confusion. Will it always be clear which provision of which law provides "greater" leave rights? Does a State law which requires 20 days' notice of leave, except where "exigent" circumstances preclude such notice, provide greater or less leave rights than H.R. 1, which provides for 30 days' notice of leave, except, if not possible, as much notice as is "practicable"? Presumably the answer would vary depending on the facts of each case. If State law provides for certification by only one medical provider, is the employer precluded from relying on a second or third opinion, as permitted under H.R. 1, particularly if the result of these opinions turns out to be adverse to the employee? If the State law provides for an express notice of intent to return, would this provision be negated by the absence of such a requirement in H.R. 1? Does a State law which exempts employers with "cafeteria plans" that include parental and medical leave as a benefit option provide greater or lesser leave rights? Yes, these questions and the many others that will arise will ultimately be resolved by the courts in individual cases, but how is an employer to develop its personnel policies in advance? Which law and which provisions of which law should the employer's policies follow?

We recognize that the approach undertaken in H.R. 1 is not unprecedented. But it does not follow that it should, therefore, be necessarily adhered to.

(7) Congressional Coverage: The bill extends the legislation to House employees but limits enforcement to its own internal Office of Fair Employment Practices while employers face DOL enforcement and court actions by employees. While federal agency enforcement is Constitutionally suspect, very good arguments can be made that private law suits in court against Members are not. Thus, the bill should at least include a private cause of action against Members in order to, within Constitutional limits, bring the House under the same laws and enforcement mechanisms as faced by the private sector.

III

In summary, we oppose this legislation because it is unnecessary, because it will result in excessive costs, because it will adversely affect the development of flexible benefit packages to the detriment of many employees, because it may result in increased discrimination against women, because it does nothing to help 50 percent of the Nation's workforce or those workers who are not wealthy enough to take unpaid leave, and because it will likely ultimately lead to future demands for paid family and medical leave and other benefits which Congress will be unable to resist. It also fails to address many legitimate concerns of employers in managing their work forces and would, in practice, generally be unworkable. Finally, it does not extend the same rights and protections to House employees to the maximum extent Constitutionally allowable.

[Attachment A]

Republican Committee Amendments to H.R. 1, the Family and Medical Leave Act

ALL AMENDMENTS DEFEATED, EXCEPT AS OTHERWISE NOTED

1. Cafeteria plans: Requirements of the Act would be satisfied with regard to employees who are eligible to participate in an employer cafeteria plan if one of the options of the plan provides the same rights and protections as H.R. 1. (Mr. Goodling)

Explanation: Provides incentive for employers to establish cafeteria plans, which would give employees a greater choice of benefits to meet individual needs and would allow the employer more flexibility in allocating benefit resources. Also allows a consistent approach to benefit planning, and administration.

2. Key employees: Delete "key employee" exemption. Exempt from definition of eligible employee any employee whose absence due to taking leave would result in substantial and grievous economic injury to the operations of the employer or substantial endangerment to the health and safety of other employees or the public. Notice would be given to the employee. (Mr. Goodling)

Explanation: The current "key employee" exemption in the bill is limited to employees in the top 10 percent of the workforce whose reinstatement would cause substantial and grievous economic harm upon reinstatement. It is difficult to envision any situation which would fit this requirement; further, many critical employees are not necessarily among the highest paid, such as safety and health professionals. The exemption is also limited to the right to be reinstated; health benefits must be continued. The proposed amendment takes a more realistic approach while placing constraints on the employer's discretion.

3. New businesses: Exempt new businesses for up to two years from the first date of establishment. (Mr. Armey)

Explanation: The initial start-up time for new businesses, where most jobs are created, is most crucial to survival. The regulatory burden placed on such businesses should, therefore, be kept to a minimum during this time. [Note: There may be some definitional difficulties here as to "when" a business is first created, but clearly proof of that burden would be on the employer claiming the exemption as it holds the documentation and evidence necessary to proving that claim.]

4. Health care provider: Delete provision which allows DOL to certify anyone as a "health care provider," retaining the requirement that such person must be a licensed doctor. (Mr. Goodling withdrew the amendment.)

Explanation: The role of a "health care provider" is critical to administering the medical leave provided in the Act and constitutes one of the few checks on possible employee abuse of leave rights. Allowing the Department of Labor

(and one may question what expertise the Department has in this area) broad discretion to define who may be such a provider potentially dilutes these protections down to nothing. In effect, Congress has delegated one of the most important aspects of the bill. Notably the proposed change would simply return to the definition of "health care provider" as contained in the House Family and Medical Leave Act as reported from the Committee in the 102nd Congress, although prior versions did contain the DOL certification provision.

4A. Health care provider: Delete DOL certification, and add that health care provider may be person licensed by State and who works under supervision of doctor. (Mr. Goodling)

4B. Health care provider: Delete DOL certification, and add that health care provider may be person licensed by State. (Mr. Goodling)

5. Serious health condition: Limit definition of "serious health condition" by providing (in addition to the existing criteria) that the condition must be of such severity, in the case of leave under 102(a)(1)(c), that it renders the child, spouse, or parent unable to participate in his or her regular daily activities. (Mr. Boehner)

Explanation: The proposed limitation comes directly from the Committee Report, p. 43, on H.R. 2, 102nd Congress. The problem with the existing statutory language is that it allows any condition which calls for "continuing treatment by a health care provider" to qualify as a serious health condition. While the definition is improved over earlier versions, it would still include minor problems such as ongoing visits to any "health care provider," for instance for braces, acne, allergies, stress, etc., of whatever severity. In effect, the existing definition has eliminated the concept of "serious" from the definition of "serious health condition." This problem also highlights the importance of tightly defining "health care provider."

6. Notice of return: Clarify that employer may ask for as much advance notice of the expected date of return to work as is possible and, further, expressly provide that where leave is expected to, or has extended, beyond three consecutive workweeks, the employer is entitled, in any case, to at least two workweeks advance notice of return. (Mr. Boehner)

Explanation: Amendment highlights (1) that the bill has no requirement for advance notice of return (although the bill now allows an employer to require periodic reports of "status and intention" to return) and (2) that the bill is completely unclear as to what happens when an employee fails to meet his or her obligations under the bill (are there any sanctions at all or are these "obligations" meaningless?). The latter issue is directly addressed in another amendment, #7, below in the context of advance notice of taking leave and scheduling requirements.

7. Employee obligations: Provide that when an employee fails, in a material way, to meet his or her obligations under the Act, he or she loses the protections of the Act. (Mr. Boehner)

Explanation: This amendment addresses an overarching concern throughout the bill. While the employee has certain obligations under the bill, what happens when the employee fails to meet those obligations? It would seem that, if those obligations are to have any importance, an employee should lose his or her right to leave under the Act if he or she fails to meet the obligations in a significant ("material") way. In this regard, it should be noted that what obligations do exist are not rigorous and are easily met by any employee acting in good faith.

8. Reinstatement: Clarify that the employer has the discretion to determine which job—the same or an equivalent position—the employee may be reinstated to after leave. (Cunningham)

9. Pay docking: Allow employers to dock pay for absences of less than one day even where employee is salaried without violating Fair Labor Standards Act, but not limited to categories of leave under H.R. 1. [Note: Majority amendment fixed as to family leave only.] (Mr. Petri) (A point of order was successfully raised regarding nongermaneness of the amendment.)

Explanation: Problem arises because DOL interprets FLSA to prohibit employers from docking the pay of salaried employees for absences of less than a day. If such docking occurs, the employee must be considered "hourly" and thus eligible for overtime pay. Yet the bill allows unpaid leave for absences which, in the case of medical leave, can clearly be for less than a day. While the conflict here is clear, it would be illogical to limit the fix to leave covered under the bill. A national policy that prohibits the docking of pay for a half day for a round of golf or for shopping trip but allows the docking of pay for medical care would make little sense.

10. COBRA: Provide the COBRA benefits (continuation of employer health care coverage at employee expense with 2% surcharge for 18 months from end of employment) would run from date leave taken when employee does not return to work even though the employer has complied with all provisions of the Act. (Mr. Ballenger)

Explanation: The intent of bill, clearly, is to provide that COBRA benefits would run from the time the employee inforcement to the House Internal Office of Fair Employ- employee could take all 12 weeks of leave, receive health benefits throughout the entire period, choose not to return to work, and then begin to receive COBRA coverage. A more equitable solution in this situation would be to have such coverage run from the date of leave.

11. Insurance premiums: Where employee contributes to health plan premiums, require employee to send the employer the equivalent amount while on leave as if the em-

ployee was still on the job. (For example, if money deducted every two weeks from paycheck, do same through mailing check in.) (Mr. Ballenger)

Explanation: The bill makes no provision for the collection of employee contributions to health care premiums while on unpaid leave even though the employer must continue health care coverage. The amendment would address this rather obvious problem.

12. Congressional coverage: Broaden Congressional coverage provision to include private cause of action in court with damages equal to those faced by the private sector. (Mr. Fawell)

Explanation: The House should, absent manifest constitutional limitations, subject itself to the same laws, including court actions and damages, as faced by those it regulates. The bill now provides for coverage but limits enforcement to the House Internal Office of Fair Employment Practices (OFEP) while employers face DOL enforcement and court actions by employees. While federal agency enforcement is constitutionally suspect, very good arguments can be made that private law suits in court against Members are not. Thus, the amendment authorizes such an action after the OFEP has considered the case or has failed to act.

13. Six-week paid leave exemption: Exempt employees who may take six weeks of paid leave of same type as covered under H.R. 1, with same job reinstatement and benefits protection. Enforcement would be on contractual basis in State court. (Mr. Goodling)

Explanation: Provides an incentive for employers to establish paid family and medical leave programs.

14. Delay effective date: Delay effective date for Title I (private sector; state and local government) for additional 6 months (i.e., increase from 6 months from date of enactment to 12 months from date of enactment). (Mr. Hoekstra) Compromise was offered by Mrs. Roukema to extend effective date for 2 months (i.e., 8 months from date of enactment).

Explanation: Deadline for issuance of DOL regulations was extended by the Majority substitute from 60 days to 120 days from effective date. Deadline for employer compliance should also be extended to allow adequate lead time to determine regulatory requirements.

[Attachment B]

No State Has Enacted Legislation as Broad as H.R. 2/S. 5

The best place to design employee benefit or "fringe benefit" packages is the workplace. The flexibility that most working parents want is most likely to be realized there. Changing demographics can be accommodated as can competing employee desires for paid leave, child care assistance, health insurance, pension coverage or a host of other

voluntarily-provided employee benefits. Just as the needs of the employee are more likely to be accommodated, the economic needs of a company facing pressing international competition or difficult short term financial problems can be a made a factor in designing employee benefits through regular employee-employer negotiations or the normal collective bargaining process.

The debate on family and medical leave suggests that many States have already passed such leave benefits as are contained in H.R. 2. Yet, that is not the case.

The following 28 States have not passed any form of the "Family and Medical Leave Act" affecting the private sector: Alabama*, Arkansas*, Alaska, Arizona, Delaware, Florida (except Dade Co.), Georgia, Idaho, Illinois, Indiana*, Maryland, Michigan*, Mississippi*, Missouri, Nebraska*, Nevada*, New Mexico*, North Carolina*, North Dakota, Ohio*, Oklahoma, Pennsylvania, South Carolina, South Dakota*, Texas*, Utah*, Virginia, Wyoming*.

*These 14 States have passed no Family and Medical Leave Act whatsoever.

No State has chosen to pass State legislation that is as broad in scope and coverage as that pending in Congress (H.R. 2). Major differences in each state law or regulation that have passed are highlighted below: (Not included are state Civil Service Codes which may provide additional leave for public sector employees only.)

ALASKA

Has a law granting state employees only 18 weeks of leave for the birth or adoption of a child over a 12 month period, or for the illness of a child, spouse, parent or self over a 24 month period. The law becomes effective Sept. 16, 1992.

ARIZONA

Has a law granting state employees only 12 weeks of leave for the birth or adoption of a child, or for the illness of the employee, and only 40 hours for the illness of a family member.

CALIFORNIA

Has a maternity disability law applicable to private sector employees granting a "reasonable period" of time off for pregnancy and childbirth. California also has paid temporary disability insurance.

Has a parental leave law (including adoption leave) for state employees only providing 1 year of leave.

Has a law requiring employers with 50 or more employees to provide up to 4 months over a 2 year period unpaid leave for birth or adoption of a child or a seriously ill child, parent or spouse.

COLORADO

Has 2 separate laws covering both state and private sector employees that grants time off for maternity disability (a "reasonable period" of time) and adoption (same amount of time as given to biological parents). The law applies to employers with one or more employee.

CONNECTICUT

Has a "parental leave" law applicable to state and private sector employees that grants 16 weeks (24 weeks for state employees) of unpaid leave for birth, adoption, illness of a child, spouse, parent or employee during a two-year period. Exempts employers with fewer than 75 employees through June 1993. Beginning July 1993, the number of employees shall be determined on the first of October annually.

DELAWARE

Has an adoption leave bill applicable to state employees only for 6 weeks. The law includes a provision for up to one year of personal leave that can be used for the birth of a child.

DISTRICT OF COLUMBIA

Has a law requiring all employers with 50 or more employees to grant 16 weeks of leave over a 24 month period for birth of child, adoption, foster care, and illness of family member or self. Also provides leave to recover from a serious illness rendering the employee unable to work. Beginning October 1994, employers with fewer than 20 employees are exempt.

FLORIDA

Has a law granting state employees only up to six months unpaid leave for the birth or adoption of a child, or illness of a child, parent or spouse. Florida's Dade County passed a county-level law granting public and private sector employees 90 days of leave for the birth or adoption of a child, or for the illness of a child, spouse, parent or self.

GEORGIA

Has a law granting state employees only 12 weeks of leave for the birth or adoption of a child, or for the illness of a child, spouse, parent or employee. The law becomes effective January 1, 1993.

HAWAII

Has a law granting 4 weeks of leave to state and private sector employees for the birth or adoption of a child, or for the illness of a child, spouse or parent. Law becomes effec-

tive in 1994 for private employers. Hawaii also has paid temporary disability insurance.

IDAHO

Has a law granting state employees only 6 months of leave for the birth of a child or the illness of a family member or self.

ILLINOIS

Has a law granting state employees only 1 year for parental leave and for serious family "dilemmas".

IOWA

Has a law granting state and private sector employees up to 8 weeks of leave for pregnancy, childbirth, miscarriage or abortion. Employers with fewer than four employees are exempt.

KANSAS

Has a law providing for leave for state and private sector employees granting a "reasonable period" of time off for pregnancy, childbirth, adoption, miscarriage or abortion. Exempts employers with fewer than 4 employees.

KENTUCKY

Has a law granting up to 6 weeks leave for adoption available to state and private sector employees. The law applies to employers with one or more employees.

LOUISIANA

Has a law providing up to 4 months off for maternity disability for state and private sector employees. State employees are granted up to 5 weeks leave to care for an ill child, spouse or elderly parent.

MAINE

Has a law similar in coverage to H.R. 2, applicable to state and private sector employees, but grants only 10 weeks of leave over a 2 year period.

MARYLAND

Has a law applicable to state employees only granting 12 weeks of leave for the birth, adoption or illness of a child, spouse, parent or legal dependent. Employee leave for medical condition is not specifed in the law.

MASSACHUSETTS

Has a maternity (and adoption) leave law applicable to state and private sector employees that grants up to 8 weeks of leave. Exempts employers with fewer than 6 - ployees.

MINNESOTA

Has a law providing for parental leave of up to 6 weeks for the birth or adoption of a child for state and private sector employees. An employee's sick leave may be used for care for the illness of their child. Employers with fewer than 21 employees are exempt.

MISSOURI

Has a law covering state employees only granting the same amount of time as given to biological parents for adoption leave. The law requires an employer to not penalize an employee for the time of during the leave period.

MONTANA

Has a law providing state and private sector employees with time off (a "reasonable time") for maternity disability leave. Montana also has a law for state employees only granting "reasonable leave" following the birth or adoption of a child.

NEW JERSEY

Has a law very similar to H.R. 2; however, the law does not include leave for medical conditions of employees, i.e. pregnancy. The law phases in over 4 years with varying small business thresholds throughout the 4 years. New Jersey also has paid temporary disability insurance.

NEW YORK

Has a law providing adoption leave benefits to state and private sector employees to the same extent as it is given to biological parents. Job reinstatement is not specified in the law. New York also has paid temporary disability insurance.

NORTH DAKOTA

Has a law for state employees only providing for parental leave of up to 4 months, as well as for the illness of a child, spouse, parent of self.

OKLAHOMA

Has a state law for state employees only providing for parental leave of a period that is not specified for the birth, adoption, or illness of a child or dependent adult. No medical condition coverage for employees is provided in the law.

OREGON

Has a law for state and private sector employees that grants up to 12 weeks for the birth or adoption of a child during a 12 month period, and 12 weeks leave for medical conditions of family members, e.g., spouse, parent, child or parent-in-law, during a 24 month period. The law includes

no provision for leave for medical conditions of the employee.

PENNSYLVANIA

Has a law for state employees only that grants up to 6 months of leave for birth, adoption of a child.

Has a law applicable to the private sector that requires adoption leave to be given to the same extent as that given to biological parents.

RHODE ISLAND

Has a law for state and private sector employees that provides up to 13 weeks leave over a 24 month period for the birth, adoption or illness of a child, spouse, parent or the employee. Leave is granted for medical conditions of family members. Rhode Island also has paid temporary disability insurance. Employers with fewer than 50 employees are exempt.

SOUTH CAROLINA

Has a law for state employees only granting up to 6 months leave for pregnancy, childbirth or illness of the employee, 6 weeks for adoption and 5 days to care for the illness of a child, spouse or parent.

TENNESSEE

Has a law requiring maternity leave of up to 4 months for state and private sector employees. Job reinstatement can be to the previous or a similar job. The law exempts those employers with fewer than 100 employees.

VERMONT

Has a law for state and private sector employees permitting 12 weeks leave for the birth or adoption of a child, or the illness of a child, spouse, parent or employee. Employer exemptions vary.

VIRGINIA

Has a law for state employees only granting up to 6 weeks of leave for the birth or adoption of a child. The law provides no medical leave coverage.

WASHINGTON

Has a law mandating time off (12 weeks) for the birth, adoption or illness of a child during a 24 month period. The law applies to employers with one or more employees. Washington also provides pregnancy disability leave for the period of physical disability.

WEST VIRGINIA

Has a law for state and private sector employees granting up to 12 weeks off for the birth, adoption or illness of a child, spouse, parent or dependent.

WISCONSIN

Has a law for state and private sector employees that grants up to 6 weeks of leave for the birth or adoption of a child and up to 2 weeks for the illness of a child, spouse, parent or employee. Exempts employers with 50 or fewer employees.

The above is according to information available to the Department of Labor. August 1992.

BILL GOODLING.
DICK ARMEY.
HARRIS W. FAWELL.
CASS BALLENGER.
BILL BARRETT.
JOHN A. BOEHNER.
DUKE CUNNINGHAM.
PETER HOEKSTRA.
BUCK MCKEON.
DAN MILLER.

ADDITIONAL VIEWS OF REPRESENTATIVES THOMAS E. PETRI AND ROBERT E. ANDREWS

As Congress prepares to enact the Family and Medical Leave Act, we believe that, in addition to considering the establishment of minimum workplace leave standards, it is equally important that the Congress consider the removal of existing obstacles to flexible workplace leave policies and practices. The Department of Labor's so-called "pay docking" rule is just such an obstacle.

This rule prohibits employers from providing salaried workers with unpaid leave on a partial-day basis. If such leave is provided (or even if it is merely available), the workers' exemption under the federal overtime laws is nullified and the employer owes each salaried employee overtime for at least the previous two years. This overtime pay is owed to all of the salaried employees even those who never took unpaid leave.

The Department's rationale is that the employer was treating those employees as though they were hourly and not salaried workers, regardless of their income level. Under the Department's view, a CEO could even be considered an hourly employee owed overtime pay. Interestingly, the Department does not apply this rule to itself or the rest of the Federal government.

Employers who have run afoul of this rule have been those with flexible leave policies who have told their employees that even if they have exhausted their paid leave, they can still take an afternoon off to deal with a family situation such as a call from the school or day care center to deal with a sick child. For example, Helix Environmental Inc. in Dayton, Ohio, has been told by the Department of Labor that it owes each of its 14 engineers overtime back pay. The company incurred this liability by having a practice of allowing its employees (most of whom are women with families) leave for all or part of a day at any time, regardless of how much work is left waiting. Since the company is unable to afford unlimited paid leave, this leave has frequently been taken on an unpaid basis. Helix's employees were shocked to learn that their employer was actually being penalized by the Department of Labor for its flexibility. To comply with the "pay docking" rule, the company now tells its employees they must take leave in full-day increments.

As introduced, H.R. 1 could have set a trap for employers who allowed employees to take unpaid leave required by the bill on a partial day basis. Meanwhile, employers aware of the "pay docking" rule would have required employees to take unpaid leave in whole-day segments, thus restricting flexible leave policies the bill purports to encourage. Fortunately, this conflict has been avoided by exempting leave taken under the bill from the "pay docking" rule.

However, this narrow exception still fails to address the need for flexibility in numerous other situations:

Employees of employers with fewer than 50 employees;

Employees wishing to take time off to address the needs of a child who does not have a "serious medical condition";

Employees who need family leave but have exhausted the 12 weeks provided under the bill; and

Employees who want to take partial-day leave on an unpaid basis in order to conserve their paid leave accruals.

Moreover, the bill's partial "fix" results in an anomaly under the Fair Labor Standards Act: an employer can deduct an absence taken for family leave needs from an employee's paycheck but the employer is prohibited from "docking" the pay of an employee who takes the afternoon off to play golf. Another anomaly is that while an employer with more than 50 employees is required (and permitted) to provide intermittent and unpaid medical leave, an employer with less than 50 employees is prohibited from doing so by the "pay docking" rule.

This roadblock to workplace flexibility must be removed. Of equal importance is the need to eliminate the enormous liability already incurred in the private and public sector by employers who have run afoul of the "pay docking" rule by having flexible leave policies. In the public sector in California alone, the liability has been estimated by the Governor to be $3 billion. While the "pay docking" rule has been eliminated prospectively in the public sector, enormous liability remains.

The "pay docking" rule should be eliminated along with any past liability which has been incurred under it. We are committed to removing this obstacle to workplace flexibility as early as possible in the 103rd Congress.

Tom Petri.
Robert E. Andrews.

ADDITIONAL VIEWS OF REPRESENTATIVES ROUKEMA AND MOLINARI

If ever there was a bill which validates the Republican commitment to hard work, self-reliance and family values, it is the Family and Medical Leave Act. By allowing workers who are experiencing a family medical crisis to take a modest period of unpaid leave to care for a family member and return to their jobs, this legislation helps American families help themselves. I recognize the fact that two-income families and single working parents have become the norm, often putting the American family in direct conflict with the demands of the workforce. As a Republican who is committed to putting pro-family rhetoric into action, I believe that H.R. 1 is urgently needed to bring federal labor standards into line with the changing needs of the American workforce.

The history of American labor law shows that federal labor standards have developed to meet the changes necessitated by fundamental shifts in the working patterns and demographics of the workforce. Laws concerning child labor, worker health and safety standards, the minimum wage, and forty-hour work week were all enacted in response to problems experienced by the American worker, and the need to provide minimum standards of protection in the workplace. These laws have benefited all working Americans. The Family and Medical Leave Act, by creating a modest minimum standard of unpaid leave and health insurance in circumstances involving documented family medical emergencies, is completely in keeping, in letter and in spirit, with our existing labor standards.

The demographics of the American workforce have been changed dramatically since the 1970's. Two-earner and single-parent families now comprise a majority of the American workforce. Unfortunately, American labor standards have lagged behind. Currently, women make up more than 45% of the workforce, and most are mothers with young children. In addition, there are 9.7 million households headed by single parents. Indeed, the traditional family where the father is present as breadwinner and mother stays at home, is no longer the norm. At the same time, the number of persons who are living beyond the age of 75 is skyrocketing and straining resources available to care for the disabled elderly. While women are no longer at home to be the primary caregivers to sick children, spouses, or elderly parents, family responsibilities have not diminished. But those who must meet their family responsibilities have not diminished. But those who must meet their family responsibilities are often faced with the necessity of making a living and being a caregiver.

In the meantime, American business is not offering family and medical leave on a voluntary basis in sufficient numbers to obviate the need for a federal minimum labor standard. The Bureau of

Labor Statistics most recent surveys show that only about 37% of working women have any form of maternity leave, and that family and medical leave is offered in only 5% of cafeteria benefit plans. The contention of critics of H.R. 1 that employers are rushing to offer family and medical leave to retain their workers, is not supported by neutral statistics.

Opponents of H.R. 1 also argue that the bill entails many hidden costs of business in accommodating the requirement of 12 weeks per year of unpaid leave to care for an ill parent, child or spouse, for childbirth or adoption, or an employee's own serious illness. However a study commissioned by the Small Business Administration (SBA) stated that the net cost to employers of placing workers on leave is substantially smaller than the cost of firing the employee with a family medical emergency and recruiting and training a new employee per year. The SBA study stands in stark contrast to early estimates of the costs of family and medical leave provided by the business community which, before being withdrawn as exaggerated, were set at $23 billion per year.

In fact, H.R. 1 provides necessary safeguards to meet the legitimate concerns of business to prevent abuse, and give employers sufficient flexibility. Central to curtailing abuse of family and medical leave is the fact that the leave is unpaid. Few if any employees can afford to forego their paychecks for any period of time unless a critical medical emergency forces them to make a choice of meeting their family responsibilities or staying on the job.

Further, an employee may be required to obtain up to three medical certifications of illness serious enough to justify taking leave. An employee must give reasonable notice of their intent to take leave so as not to unduly disrupt an employer's operations. H.R. 1 applies only to permanent employees who have worked at least 1,250 hours for their employers during the previous 12 months. Thus, seasonal or other short-term workers are not eligible for leave.

Key employees, whose absence may cause an employer grave economic harm, are not entitled to reinstatement under H.R. 1. A key employee is defined as a salaried employee who is among the highest paid 10% employees. Moreover, the Family and Medical Leave Act only covers those employers who have 50 or more employees.

Most of the safeguards for business now present in H.R. 1 are the result of extensive negotiation and compromise. In fact, the Family and Medical Leave Act has undergone numerous changes since its initial introduction several years ago. I would suggest only one further change that I consider both reasonable and appropriate. In fact, its adoption is important to maintaining the integrity of another employer safeguard already included in the bill.

H.R. 1 now defines "health care provider" as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or, any other person determined by the Secretary of Labor to be capable of providing health care services. I believe the bill provides excessive discretion to the Secretary with regard to the designation of health care provider, while providing virtually no guidance as to the factors the Secretary should consider when making such designation. The significance of this broad authority becomes evident when one

considers that the bill allows employers to require a health care provider's medical certification as to employees' need for leave. I believe that in order to maintain the integrity of the certification safeguards the bill should, at a minimum, require any individual designated as a "health care provider," to be licensed by the State in which the individual provides health care services.

Nevertheless, I continue to believe the bill includes ample provisions for business flexibility while meeting the needs of working Americans. This one needed change should not delay it's immediate consideration and passage.

Nor should the claims of the bill's opponents that H.R. 1 constitute a costly and burdensome "mandate." Many of these same arguments were used to oppose the Fair Labor Standards Act of 1938, and the enactment of other federal labor standards. Just as the federal minimum wage and laws against child labor did not adversely affect American business growth or productivity, neither will adoption of H.R. 1. And just as the integrity of the workplace hung in the balance prior to the enactment of these older labor standards, the viability of the American working family is at stake in the debate over the Family and Medical Leave Act.

MARGE ROUKEMA.
SUSAN MOLINARI.

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